CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 JUNE 18, 1997 NO. 24/25

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.ustreas.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 97–42)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license without prejudice.

Port	*Individual*	*License #*
Chicago	ASG Forwarding, Inc.	5898
New York	Joseph DiSano	2567
New York	Albert Weber	2245
Seattle	Alexandrer M. Bryce, Jr	2668
Seattle	Susanne J. Theuer	6767
Mobile	Steve Mace	12254
St. Louis	Ruth M. Stewart, C.H.B.	3883

Date: May 23, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, June 4, 1997 (62 FR 30672)]

(T.D. 97–43)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license with prejudice.

Port	*Individual*	*License #*
New York	Mark V Customhouse Brokers, Inc.	9719

Date: May 23, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, June 4, 1997 (62 FR 30672)]

(T.D. 97–44)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses. License 7114, issued in the Los Angeles Customs port, remains a valid license.

Port	*Individual*	*License #*
Los Angeles	Abraham Shiepe	7114

Date: May 23, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, June 4, 1997 (62 FR 30672)]

19 CFR Part 24

(T.D. 97–45)

RIN 1515–AA57

UPDATE OF PORTS SUBJECT TO THE HARBOR MAINTENANCE FEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulation; solicitation of comments.

SUMMARY: Commercial vessels transporting cargo at certain ports are subject to a harbor maintenance fee pursuant to the Water Resources Development Act of 1986 and interim Customs Regulations regarding the harbor maintenance fee. This document amends the list of ports subject to the fee. This amendment is made to further clarify the port descriptions and to update the list as to locations which are exempt from the fee.

DATES: The port descriptions are effective as of June 4, 1997. Written comments must be received by July 7, 1997.

ADDRESSES: Written comments (preferably in triplicate) may be submitted to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229, and may be inspected at Franklin Court, 1099 14th Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Patricia Barbare, Office of Finance, U.S. Customs Service, 202–927–0034.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Water Resources Development Act of 1986 (Pub. L. 99–662) established a Harbor Maintenance Trust Fund to be used for improving and maintaining ports and harbors in the U.S. Pursuant to the Act, this fund is supported by a harbor maintenance fee assessed on port use by vessels carrying waterborne commercial cargo. By assessing a charge for port use, the Act causes those shippers, exporters and importers who benefit from the maintenance of a Federal port or harbor to share in the cost of that maintenance.

The Act defines port generally as any channel or harbor or component thereof in the U.S. which is not an inland waterway, is open to public navigation, and at which Federal funds have been used since 1977 for construction, maintenance or operation.

Customs published T.D. 87–44 in the Federal Register (52 FR 10198) on March 30, 1987, establishing interim regulations for the collection of the harbor maintenance fee. The regulations are set forth in § 24.24,

Customs Regulations (19 CFR 24.24). When drafting T.D. 87–44, Customs, in conjunction with the U.S. Army Corps of Engineers, took the definition of port in the Act and established a list of ports in § 24.24(b)(1), Customs Regulations (19 CFR 24.24(b)(1)). The list of ports includes in the descriptions and notations column the description of movements which are considered intraport; pursuant to the Act and § 24.24(d)(1) of the regulations, the fee is not to be assessed on the mere movement of commercial cargo within a port. Commercial ports with depths of less than 14 feet were not included on the list. Customs stated in T.D. 87–44 that the list is subject to change and will be amended, if necessary, to reflect money spent by the U.S. Army Corps of Engineers for construction, maintenance or operation of any port not on the original list. The list of ports which are subject to the HMF was amended in T.D. 92–7.

Since the publication of T.D. 92–7, there has been some modification of ports on which there is relevant Corps of Engineers activity. In order to provide the shipping public with the best available information on which ports the HMF will be assessed, Customs has decided to publish this revised list of HMF ports.

Litigation is ongoing regarding the constitutionality of the HMF as it is applied to port use associated with exports. However, the fee is still being collected for all purposes pending the outcome of the litigation and will most likely continue to be collected on port use not associated with exports regardless of the outcome of the litigation.

In this document, Customs again is amending the interim regulations on the harbor maintenance fee to clarify the listing in § 24.24(b)(1) of ports subject to the HMF. A document finalizing the interim regulations on the HMF will be published once the litigation involving the constitutionality of the fee has been completed.

COMMENTS

It is noted that the harbor maintenance fee regulations are still interim. While the comment period has expired on the main portion of the interim regulations (see 52 FR 20593, dated June 2, 1987; extension of comment period on interim regulations to August 28, 1987), Customs will give consideration any written comments (preferably in triplicate) timely submitted relating to the description of the ports set forth in this document. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations Branch, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

The statutory effective date of the harbor maintenance fee was April 1, 1987. Because these amendments merely clarify the interim regulations that implement the statutory provision and do not impose any additional burdens on, or take away any existing rights or privileges from the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable and unnecessary. Similarly, pursuant to 5 U.S.C. 553(d)(1)(3), a delayed effective date is not provided. These amendments are effective as of the date of publication in the Federal Register.

EXECUTIVE ORDER 12866 AND REGULATORY FLEXIBILITY ACT

This amendment does not meet the criteria for a "significant regulatory action" under E.O. 12866. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* are not applicable.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U. S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, Customs duties and inspection, Imports, Taxes.

AMENDMENT TO THE REGULATIONS

Part 24, Customs Regulations (19 CFR Part 24) is amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority for part 24, Customs Regulations (19 CFR part 24) and the specific relevant authority for § 24.24 Customs Regulations (19 CFR 24.24), continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624; 31 U.S.C. 9701.

* * * * * * *

Section 24.24 also issued under 26 U.S.C. 4461, 4462;

* * * * * * *

2. The list of ports subject to the harbor maintenance fee set forth in § 24.24(b)(1), Customs Regulations (19 CFR 24.24(b)(1)) is revised to read as follows:

§ 24.24 Harbor Maintenance Fee.

* * * * * * *

(b) *Definitions.*
(1) * * *

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE

(Section 1402 of PL 99–662, as amended)

Port code, port name and state	*Port descriptions and notations*
Alabama	
1901—Mobile	
Alaska	
3126—Anchorage	Includes Seldovia Harbor, and Homer. Movements between these points are intraport.
3106—Dalton Cache	Includes Haines Harbor.
3101—Juneau	Includes only Hoonah Harbor. Fee does not apply to Juneau Harbor.
3102—Ketchikan	Includes Metlakatla Harbor. Fee does not apply to Wades Cove.
3127—Kodiak	
3112—Petersburg	Includes Wrangell Narrows.
3125—Sand Point	Includes Humboldt, King Cove and Iliuliuk Harbor. Fee does not apply to Dutch Harbor.
3115—Sitka	Includes Sergius-Whitestone Narrows.
—St. Paul	
California	
2802—Eureka	Includes Crescent City.
Los Angeles/Long Beach Ports:	Includes Ventura, Port Hueneme, Channel Islands Harbor, Santa Barbara, Marina Del Ray, Los Angeles and Long Beach. Movements between these points are intraport.
2709—Long Beach Harbor	
2704—Los Angeles	
2713—Port Hueneme	
2712—Ventura	
2805—Monterrey	
2719—Moro Bay	Includes only Moro Bay.
2501—San Diego	Includes San Diego River and Mission Bay, and Oceanside Harbor.
2707—San Luis	
San Francisco Bay Area Ports*	Includes all points inshore of the Golden Gate Bridge on the bays and the straits and on the Napa, Sacramento and San Josquin Rivers, and on the deep water channels to Sacramento and Stockton. Movements between points above Suisun Bay (Longitude 122 degrees West at Port Chicago) are intraport. Movements between points below Longitude 122 degrees West and the Golden Bridge are all intraport. All other movements are interport.
2813—Alameda	
2830—Carquinez Strait	
2815—Crockett	
2820—Martinez	
2811—Oakland	
2821—Redwood City	
2812—Richmond	
2816—Sacramento	
2809—San Francisco	
2828—San Joaquin	
2829—San Pablo Bay	
2827—Selby .	
2810—Stockton	
2831—Suisun Bay	

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Connecticut	
0410—Bridgeport	Includes Housatonic River, and Stamford Harbor, and Wilson Point Harbor. Movements between these points are intraport.
0411—Hartford	Includes all points on the Connecticut River between Hartford and Long Island Sound. Movements within this area are intraport.
0412—New Haven	
0413—New London	Includes all points on the Thames River from the mouth to, and including Norwich, CT. Also includes Groton, CT.
Delaware	
Delaware River Ports, DE, NJ, PA*	Includes all points on the Delaware River from Trenton to the sea at a line between Cape Henlopen and Cape May, all points on the four miles of the Christina River, Delaware, and all points on the lower six miles of Schuylkill River, Pennsylvania. Fee applies to all movements on the Chesapeake and Delaware Canal east of U.S. Highway 13. Includes Absecon Inlet (Atlantic City) and Cold Spring Inlet. Movements within this area are intraport.
1102—Chester, PA	
1107—Camden, NJ	
1113—Gloucester, NJ	
1118—Marcus Hook, PA	
1105—Paulsboro, NJ	
1101—Philadelphia, PA	
1103—Wilmington, DE	
District of Columbia	
Potomac River Ports, DC, MD, VA*	Includes all points on the Potomac River (see Chesapeake Bay Ports map) from a line between Point Lookout and the Little Wicomico River at Chesapeake Bay to and including Washington and Alexandria. Movements between these points are intraport.
5402—Alexandria, VA	
5401—Washington, DC	
Florida	
1807—Boca Grande	
1805—Fernandina Beach	
5205—Fort Pierce	
1803—Jacksonville	
5202—Key West	
5201—Miami	
1818—Panama City	For HMF purposes, also includes Carrabelle and Port St. Joe.
1819—Pensacola	
1816—Port Canaveral	
5203—Port Everglades	
Tampa Bay Ports*	Includes Alafia River, Port Manatee, Port Sutton, Port Tampa Weedon Island, and all other points on or approached using the Tampa Harbor Channel inshore of the Sunshine Skyway Bridge. Movements between these points are intraport.
1814—St Petersburg	
1801—Tampa	
5204—West Palm Beach	
Georgia	
1701—Brunswick	Includes St. Marys River.
1703—Savannah	

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Hawaii	
3202—Hilo	Includes Kawaihae.
3201—Honolulu	Includes Barbers Point Harbor.
3203—Kahului	Includes Kaunakakai Harbor.
3204—Nawiliwili-Port Allen	Includes both Nawiliwili and Port Allen.
Illinois	
Southern Lake Michigan Ports 3901—Chicago, IL 3902—East Chicago, IN 3905—Gary, IN	Includes Waukegan Harbor, Il., Indiana Harbor (East Chicago, IN) Calumet Harbor, the Chicago River (up to the North Avenue Bridge) and the Chicago Harbor. Fee applies at the ports of Michigan City and Burns Waterway Harbor, IN. Fee does not apply at Buffington Harbor or Gary Harbor. Movements within an area from Waukegan, IL to Michigan City, IN are intraport.
Indiana	
Southern Lake Michigan Ports 3901—Chicago, IL 3904—East Chicago, IN 3905—Gary, IN	Includes Waukegan Harbor, IL. Indiana Harbor (East Chicago, IN) Calumet Harbor, the Chicago River (up to the North Avenue Bridge) and the Chicago Harbor. Fee applies at the ports of Michigan City and Burns Waterway Harbor, IN. Fee does not apply at Buffington Harbor or Gary Harbor. Movements within an area from Waukegan, IL to Michigan City, IN are intraport.
Louisiana	
2017—Lake Charles	Includes all points on the Calcasieu River and Pass. Also includes Mermentau River from Catfish Point Control Structure to the Gulf.
Mississippi River Ports/ Baton Rouge and Vicinity* 2004—Baton Rouge 2010—Gramercy	Includes all river points from River Mile 115 Above Head of Passes (AHP) at the St. Charles Parish-Jefferson Parish line, to River Mile 233.9 AHP at Baton Rouge. Includes Destrehan, Good Hope, and St. Rose. Movements between these points are intraport.
Mississippi River Ports/ New Orleans and Vicinity* 2002—New Orleans 2005—Port Sulphur	Includes all river points from River mile 115 Above Head of Passes (AHP) to Mile 21.6 Below Head of Passes (BHP) via Southwest Pass and to Mile 14.7 BHP via South Pass. Also includes all points on the Inner Harbor Navigation Canal, Avondale, and the Mississippi River Gulf Outlet. Movements between these points are intraport.
2001—Morgan City*	Includes Atchafalaya River from Morgan City to the Gulf. Includes all points on the Houma Navigation Canal, and points on the Gulf Intra-coastal Waterway between Mile 49.8 West and Mile 107.0 West. Movements between these points are intraport.

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Maine	
0102—Bangor	
0111—Bath	
0131—Portsmouth, NH	
0132—Belfast	Includes all Penobscot River points (Bucksport and Winterport), and Georges River. Fee does not apply at Belfast, Searsport, Sandy Point, or Castine Harbor.
0101—Portland	
Maryland	
Chesapeake Bay Ports, MD*	Includes all Maryland points on the Chesapeake Bay and its tributary waters except for the Potomac River. Also includes the Waterway from the Delaware River to the Chesapeake Bay west of U.S. 13 highway bridge. Movements between these points are intraport. (Also see Chesapeake Bay Ports: VA)
1303—Baltimore	
1302—Cambridge	
1301—Annapolis	
Massachusetts	
0401—Boston	Includes all of the Port of Boston inshore of Castle Island on the Inner Harbor and Chelsea and Mystic River and all points on the Weymouth Fore, and Town and Black Rivers, and Dorchester Bay. Also includes Plymouth Harbor. Movements between points on the Saugus River in the North and Plymouth Harbor in the South are intraport.
0404—Gloucester	
0407—Fall River	
Michigan	
3843—Alpena	Fee does not apply to Stoneport.
Monroe/Detroit/Harbor Beach	Includes Monroe, Detroit, and the Detroit River, St. Clair River, Port Huron and all points on the Rouge and Black Rivers. Fee also applies at Harbor Beach, MI. All movements within this area between Monroe and Harbor Beach, MI are intraport.
3801—Detroit	
3802—Port Huron	
3803—Escanaba	Fee applies at all points on the little Bay de Noc above Escanaba, including Gladstone and Kipling. Movements within an area from Escanaba to the Mackinac Bridge are intraport. Fee does not apply at Escanaba.
South Central Lake Superior Ports	Includes Ontonagon Harbor, all points on the Harbor, all points on the Keweenaw Waterway, Presque Isle Harbor and Marquette and Grand Marais. Movements between all Michigan ports on Lake Superior are intraport.
3809—Marquette	
3842—Presque Isle	
Eastern Lake Michigan Ports	Fee applies at Charlevoix, Frankfort, Portage Lake, Manatee, Ludington, Pentwater Harbor, Ferrysburg, White Lake Harbor, Muskegon, Grand Haven, and South Haven, Holland, and St. Joseph/Benton Harbor, MI. All movements between Eastern Lake Michigan ports are intraport.
3815—Muskegon	
3816—Grand Haven	
3844—Ferrysburg	

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Michigan—*continued*	
Upper Lake Huron Ports 3803—Sault Ste. Marie 3804—Saginaw-Flint–Bay City 3843—Alpena	Includes all points on the St. Mary's River, the ports of Cheyboygan, Alpena, Bay City, and Saginaw River. Does not include Alabaster, Cacit, Port Dolomite, Port Inland, Port Gypum or Stoneport. Movements within an area from Sault Ste. Marie and the Saginaw River are intraport.
Minnesota	
Duluth/Superior Area Ports ... 3601—Duluth 3602—Ashland 3608—Superior 3614—Silver Bay	Fee applies at Two Harbors and Duluth, MN, and Superior, WI. Fee also applies at Ashland and Port Wing, WI and Grand Marais, MN. Fee does not apply at Taconite, or Silver Bay, MN. All movements between Silver Bay, MN and Ashland, WI are considered intraport.
Mississippi	
1902—Gulfport ..... 1903—Pascagoula	Does not include Bienville
New Hampshire	
0131—Portsmouth, NH	
New Jersey	
Delaware River Ports, DE, NJ, PA* ..... 1102—Chester, PA 1107—Camden, NJ 1113—Gloucester, NJ 1118—Marcus Hook, PA 1105—Paulsboro, NJ 1101—Philadelphia, PA 1103—Wilmington, DE	Includes all points on the Delaware River from Trenton to the sea at a line between Cape Henlopen and Cape May, all points on the lower four miles of the Christina River, Delaware, and all points on the lower six miles of the Schuylkill River, PA. Fee applies to all movements on the Chesapeake and Delaware Canal east of U.S. Highway 13. Includes Absecon Inlet (Atlantic City) and Cold Spring Inlet. Movements between these points are intraport.
1003—Newark ..... 1004—Perth Amboy.	See New York Harbor. See New York Harbor.
New York	
New York Harbor, NY, NJ* ... 1001—New York 1003—Newark 1004—Perth Amboy	Includes all points in New York and New Jersey with the Port of New York on the waters inshore of a line between Sandy Hook and Rockaway Point and south of Tappan Zee Bridge on the Hudson and west of Throgs Neck Bridge of the East River. Movements between these and all points within the New York Port District boundaries described in New York Code (Chapter 154, Laws of New York, 1921), are intraport.
1002—Albany*	Includes all points on the Hudson River between Tappan Zee Bridge and the Troy Lock and Dam. Movements between points within this area are intraport.

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
New York—*continued*	
0901—Buffalo-Niagara Falls	Includes Buffalo Harbor, Black Rock Channel and Tonawanda Harbor, and all points on Cattaraugus Creek, and Dunkirk Harbor. Movements between these points are intraport.
0706—Cape Vincent 0701—Ogdensburg 0904—Oswego 0903—Rochester	
0905—Sodus Point	Includes Little Sodus Bay Harbor, and Great Sodus Bay Harbor.
North Carolina	
1511—Beaufort-More-head City	Includes Ocracoke Inlet. Movements within this area are intraport.
1501—Wilmington	Includes all points on the Cape Fear and Northeast Cape Fear Rivers inshore of the Atlantic Ocean entrance. Movements within this area are intraport.
Ohio	
Lake Erie Ports 4108—Ashtabula 4101—Cleveland 4109—Conneaut 4106—Erie, PA 4111—Fairport 4117—Huron 4121—Lorain 4105—Toledo-Sandusky	Includes Toledo, Sandusky, Huron, Lorain, Cleveland, Fairport, Ashtabula, Conneaut and Erie. Movements between these points are intraport. Fee does not apply at Marblehead.
Oregon	
Columbia River Ports, OR, WA 2901—Astoria, OR 2904—Portland, OR 2909—Kalama, WA 2905—Longview, WA 2908—Vancouver, WA	Includes all points on the Columbia River downstream of Bonneville Dam, and all points on the Willamette River downstream of River Mile 21. Includes the Multnoma Channel, the Skipanon Channel, and Oregon Slough. Movements between points within this area are intraport.
2903—Coos Bay	Includes Port Orford, the Siuslaw River, and Umpaqua River. Movements between these points are intraport.
2902—Newport	Includes Tillamook Bay, and Yaguina Bay and Harbor.

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Pennsylvania	
Delaware River Ports, DE, NJ, PA*	Includes all points on the Delaware River from Trenton to the sea at a line between Cape Henlopen and Cape May, all points on the lower four miles of the Christina River, Delaware, and all points on the lower six miles of the Schuykill River, Pennsylvania. Fee applies to all movements on the Chesapeake and Delaware Canal east of U.S. Highway 13. Includes Absecon Inlet (Atlantic City) and Cold Spring Inlet. Movements between these points are intraport.
1102—Chester, PA	
1107—Camden, NJ	
1113—Gloucester, NJ	
1118—Marcus Hook, PA	
1105—Paulsboro, NJ	
1101—Philadelphia, PA	
1103—Wilmington, DE	
Puerto Rico	
4907—Mayaguez	
4908—Ponce	Does not include Guayanilla and Tallaboa.
4909—San Juan	Includes Arecibo.
Rhode Island	
0502—Providence	Federal project limit: Providence River East of Prudence Island just above Dyer Island and ending at Hurricane Barrier at Fox Point. The areas west of Prudence Island, including Quonset Point, Patience Island, Warwick Neck and Greenwich Bay are not subject to the fee.
South Carolina	
1601—Charleston	Includes the Ashley River, Cooper River, Shipyard River, and Port Royal Harbor. Movements within this area are intraport.
1602—Georgetown	
Texas	
2301—Brownsville	Includes Port Isabel and Brazos Island Harbor. Movements between these points are intraport.
5312—Corpus Christi	
5311—Freeport	
Galveston Bay Ports*	Includes Port Bolivar and all points on Galveston Bay in Galveston County. Movements between points within this area are intraport.
5301—Houston*	Includes Bayport, Baytown, and all other points on or accessed via the Houston Ship Channel from the Liberty/Chambers county line on the north to the Chambers/Galveston county line to the south. Movements within this area are intraport.
5313—Port Lavaca	Includes Matagorda Ship Channel.
Sabine Ports*	Includes Port Neches, Sabine Pass and all other points on the Sabine-Neches Waterway. Movements between these points are intraport.
2104—Beaumont	
2103—Orange	
2101—Port Arthur	
2102—Sabine	

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Virginia	
Potomac River Ports, DC, MD, VA*	Includes all points on the Potomac River (see Chesapeake Bay Ports map) from a line between Point Lookout and the Little Wicomico River at Chesapeake Bay to and including Washington and Alexandria. Movements between these points are intraport.
5402—Alexandria, VA	
5401—Washington, DC	
Chesapeake Bay Ports,VA* ...	Includes all Virginia points on the Chesapeake Bay inshore of a line from Cape Henry to Cape Charles, and tributary waters including the ports of Hampton Roads. Does not include the Potomac River or the James River above the James River Bridge at Newport News. Movements between points within this area are intraport. (Also see Chesapeake Bay Ports, MD.)
1406—Cape Charles	
1402—Newport News	
1401—Norfolk	
James River Ports, VA	Includes all points on the James River above the James River Bridge at Newport News. Movements between these points are intraport.
1408—Hopewell	
1404—Richmond/ Petersburg	
Washington	
3003—Aberdeen	Includes Grays Harbor and Yaguina Bay and Harbor. Movements between these points are intraport.
Puget Sound Ports, WA*	Fee applies only at ports listed. Bellingham includes all of Bellingham Bay and tributary waters north of Chuchanut Bay on the east, and Portage Island on the west. Port Everett includes all of Port Dardner (an arm of Possession Sound) between Elliott Point on the south to, and including, the Snahomish River on the north. The port of Olympia includes all points on Budd Inlet extending from Cooper and Dofflemyer Point on the north to, and including, the city of Olympia on the south. The fee applies to all points within the Inner Harbor of the Port of Seattle, including Salmon Bay, Lakes Union and Washington, the Lake Washington Ship Canal, and Kenmore Navigation Channel. Includes all points on Elliott Bay and tributary waters between West Point on the north and Duwamish Head on the south. Fee applies at all points within Tacoma Harbor including all of Commensement Bay and tributary waters between Browns Point on the east and Point Defiance on the west. Movements between these ports and any other U.S. points on Puget Sound or the Strait of Juan de Fuca east of Cape Flattery are intraport.
3005—Bellingham	
3006—Everett	
3007—Port Angeles	
3001—Seattle	
3002—Tacoma	
3026—Olympia	
3010—Anacortes	Includes only access channel and berthing areas adjacent to Anacortes Industrial Park off 30th Street.
Columbia River Ports, WA, OR	Includes all points on the Columbia River downstream of Bonneville Dam, and all points on the Willamette River downstream of River mile 21. Includes the Multnoma Channel, the Skipanon Channel, and Oregon Slough. Movements between points within this area are intraport.
2901—Astoria, OR	
2904—Portland, OR	
2909—Kalama, WA	
2905—Longview, WA	
2908—Vancouver, WA	

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—*Continued*

Port code, port name and state	*Port descriptions and notations*
Wisconsin	
3602—Ashland	See Duluth/Superior Area Ports, MN.
Green Bay/Marinette Area Ports	Fee applies to all movements between points along the Sturgeon Bay and Lake Michigan Ship Canal. Fee also applies to Green Bay, Oconto, and Menominee/ Marinette. Movements between points from Menominee and points along the Sturgeon Bay and Lake Michigan Ship Canal are intraport.
3703—Green Bay	
3702—Marinette	
Western Lake Michigan Ports	Includes the ports of Milwaukee, Racine, and Sheboygan, MN. All movements between these points are intraport.
3701—Milwaukee	
3708—Racine	
3707—Sheboygan	

*Indicates that a map of this area is available from the Budget Division, Office of Finance, U.S. Customs Service, Room 6328, 1301 Constitution Ave., N.W., Washington, D.C. 20229; tel. 202-927-0034.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: April 17, 1997.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 4, 1997 (62 FR 30448)]

(T.D. 97–46)

POLICY STATEMENT REGARDING VIOLATIONS OF 19 U.S.C. § 1592 BY SMALL ENTITIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: On March 29, 1996, the President signed the Small Business Regulatory Enforcement Fairness Act of 1996. Section 223 of that law requires an agency to establish a policy or program which reduces, and under appropriate circumstances, waives civil penalties for violations of a statutory or regulatory requirement by a small entity. As a first step in implementing this law, we are setting forth in this document the circumstances and procedures whereby the assessment of a civil penalty under the provisions of 19 U.S.C. § 1592 will be waived for violations committed by small entities.

FOR FURTHER INFORMATION CONTACT: Alan Cohen, Penalties Branch, Office of Regulations and Rulings, 202–482–6950.

SUPPLEMENTARY INFORMATION:

On March 29, 1996, the President signed the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121, 101 Stat. 847. Section 223 of that law requires an agency to establish a policy or program which reduces, and under appropriate circumstances, waives civil penalties for violations of a statutory or regulatory requirement by a small entity.

CUSTOMS POLICY STATEMENT REGARDING VIOLATIONS OF 19 U.S.C. § 1592 BY SMALL ENTITIES

Section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592) prohibits persons, by fraud, gross negligence or negligence, from entering or introducing, attempting to enter or introduce, or aiding and abetting the entry or introduction of merchandise into the commerce of the United States, by means of statements or acts that are material and false, or by means of omissions which are material. Under Customs discretionary authority pursuant to sections 592(b)(2) and 618, Tariff Act of 1930, as amended (19 U.S.C. §§ 1592(b)(2) and 1618), Customs has published national guidelines applicable to its statutory authority to assess civil penalties against persons who violate 19 U.S.C. § 1592. These guidelines provide for a reduction in the initial assessment of civil penalties, and a reduction in the penalties amount found to be ultimately due, because of the presence of specified mitigating factors.

In considering petitions filed pursuant to sections 592(b)(2) and 618, mitigating factors which apply to small entities include: (1) reasonable reliance on misleading or erroneous advice given by a Customs official; (2) cooperation with the investigation beyond that expected for an entity under investigation; (3) immediate remedial action, including the payment of the actual loss of duties prior to the issuance of a penalty notice and within 30 days of the determination of the duties owed; (4) inexperience in importing, provided the violation is not due to fraud or gross negligence; (5) prior good record, provided that the violation is not due to fraud; (6) the inability of the alleged violator to pay the penalty claim; (7) extraordinary expenses incurred by the violator in cooperating with the investigation or in undertaking immediate remedial action; and (8) actual knowledge by Customs of a violation not due to fraud, where Customs failed to inform the entity so that it could have taken earlier corrective action. This list of factors is not exclusive.

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, the Customs Service is implementing a procedure whereby, under appropriate circumstances, the issuance of a penalty notice under 19 U.S.C. § 1592(b)(2) will be waived for businesses qualifying as small business entities. Specifically, an alleged violator which has been issued a prepenalty notice under 19 U.S.C. § 1592(b)(1) may assert in its response to the prepenalty notice that it is a small business entity, as defined in section 221(1) of the Small Business Regulatory Enforcement Fairness Act of 1996, and in 5 U.S.C. § 601, and that all of the following circumstances are present: (1) the

small entity has taken corrective action within a reasonable correction period, including the payment of all duties, fees and taxes owed as a result of the violation within 30 days of the determination of the amount owed; (2) the small entity has not been subject to other enforcement actions by Customs; (3) the violation did not involve criminal or willful conduct, and did not involve fraud or gross negligence; (4) the violation did not pose a serious health, safety or environmental threat, and (5) the violation occurred despite the small entity's good faith effort to comply with the law.

The alleged violator will have the burden of establishing, to the satisfaction of the Customs officer issuing the prepenalty notice, that it qualifies as a small entity as defined in section 221(3) of the Small Business Regulatory Enforcement Fairness Act of 1996, and that all five of the above circumstances are present. In establishing that it qualifies as a small entity, the alleged violator should provide evidence that it is independently owned and operated; that is, there are no related parties (domestic or foreign) as defined in 19 U.S.C. § 1401a(g)(1), that would disqualify the business as a small business entity. Furthermore, the alleged violator must establish that it is not dominant in its field of operation. Finally, the alleged violator must provide evidence, including tax returns for the previous three years and a current financial statement from an independent auditor, of its annual average gross receipts over the past three years, and its average number of employees over the previous twelve months.

Each claim by an alleged violator that it qualifies as a small business entity will be considered on a case by case basis. In considering such claims, the Customs Service will consult the size standards set by the Small Business Administration, 13 C.F.R. § 121.201, for guidance in determining whether the alleged violator qualifies as a small business. If the alleged violator's claims for a waiver of the penalty under the Small Business Regulatory Enforcement Fairness Act of 1996 are not accepted and a penalty notice is issued, or if the alleged violator fails to assert a claim for a waiver of the penalty under this Act when the prepenalty notice is issue, the alleged violator may pursue its claim for a waiver of the penalty in a petition filed pursuant to 19 U.S.C. § 1592(b)(2).

This policies set forth in this notice are issued pursuant to the discretionary authority granted to the Secretary of the Treasury under 19 U.S.C. § 1618 to remit and mitigate penalties, and do not limit the government's right to initiate a civil enforcement action under 19 U.S.C. § 1592(e), nor do they limit the penalty amount which the government may seek in such an enforcement act, nor do they confer upon the alleged violator any substantive rights in such an enforcement action.

Dated: May 21, 1997.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

[Published in the Federal Register, June 3, 1997 (62 FR 30378)]

(T.D. 97–47)

COUNTRY OF ORIGIN MARKING OF PRODUCTS OF HONG KONG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of policy.

SUMMARY: This document notifies the public that, with respect to imported goods produced in Hong Kong after the reversion of that region to China on July 1, 1997, the proper country of origin marking for such goods will continue to be "Hong Kong."

EFFECTIVE DATE: The position set forth in this document is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 1, 1997.

FOR FURTHER INFORMATION CONTACT: Craig Walker, Special Classification and Marking Branch (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Failure to mark an article in accordance with the requirements of 19 U.S.C. 1304 shall result in the levy of a duty of ten percent *ad valorem*. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Pursuant to the Sino-British Joint Declaration, signed in 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. With respect to goods produced in Hong Kong while under the sovereignty of Great Britain, the Customs Service has taken the position that such goods should properly be marked to indicate that their origin is "Hong Kong."

It has been determined that no change in the current practice regarding the country of origin marking of goods produced in Hong Kong should be made as a result of the reversion of that region's sovereignty to China. Therefore, this document notifies the public that, unless excepted from marking, goods produced in Hong Kong which are entered or withdrawn from warehouse for consumption into the U.S. on or after

July 1, 1997, shall continue to be marked to indicate that their origin is "Hong Kong."

Dated: May 29, 1997.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, June 5, 1997 (62 FR 30927)]

U.S. Customs Service

General Notices

PROCEDURES IF THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM EXPIRES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: The Generalized System of Preferences (GSP) is a preferential trade program that allows eligible products of many developing countries to enter the United States duty-free. The GSP is currently scheduled to expire at midnight on May 31, 1997, unless its provisions are extended by Congress. This document provides notice to importers that claims for duty-free treatment under the GSP may not be made for merchandise entered or withdrawn from a warehouse on or after June 1, 1997, if the program is not extended before that date. The document also sets forth mechanisms to facilitate refunds, if the GSP is renewed retroactively.

DATE: The plan set forth in this document will become effective as of June 1, 1997, if Congress does not extend the GSP program before that date.

FOR FURTHER INFORMATION CONTACT:

For specific questions relating to the Automated Commercial System:

Arthur Versich, Office of Automated Commercial System, 202–927–1042.

For general operational questions:

Formal entries	John Pierce, 202–927–1249;
Informal entries	Thomas Wygant, 202–927–1167;
Mail entries	Dan Norman, 202–927–0542;
Passenger claims	Robert Jacksta, 202–927–1311.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 501 of the Trade Act of 1974 (the Act), as amended (19 U.S.C. 2461) authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free treatment for eligible articles

imported from designated beneficiary countries. Beneficiary developing countries and articles eligible for duty-free treatment under the GSP are designated by the President by Presidential Proclamation in accordance with sections 502(a) and 503(a) of the Act (19 U.S.C. 2462(a) and 2463(a)). Pursuant to 19 U.S.C. 2465(a), as amended by the GSP Renewal Act of 1996 (the Act, Pub.L. 104–188, 110 Stat. 1775, at Stat. 1917), duty-free treatment under the GSP is presently scheduled to expire on May 31, 1997.

Congress is currently considering whether to extend the GSP program. If legislation is enacted but does not become law before the GSP expires, language may be included that would renew the GSP retroactively to the date of its presently scheduled expiration and Customs will need to reliquidate numerous entries to make refunds of duties collected. However, if Congress does not pass legislation renewing the GSP before midnight, May 31, 1997, no claims for duty-free treatment under the program may be allowed on entries made after that time.

Recognizing the impact that retroactive renewal and consequent numerous reliquidations would have on both importers and Customs, Customs has developed a mechanism to facilitate refunds, should GSP be renewed retroactively. Set forth below is Customs plan that will be implemented on June 1, 1997, if the GSP has not been extended by that date.

FORMAL ENTRIES

Claims—Duties must be deposited:

No claims for duty-free treatment under the GSP may be made for merchandise entered, or withdrawn from warehouse for consumption on or after June 1, 1997. Duties at the most-favored-nation rate must be deposited, or a claim may be made under another preferential program for which the merchandise may qualify (for example, the Andean Trade Preference Act or the Caribbean Basin Economic Recovery Act).

While estimated duties must be deposited, all filers who file entry summaries through the Automated Broker Interface (ABI) may continue to file using the Special Program Indicator (SPI) for the GSP (the letter "A") as a prefix to the tariff number for all merchandise that would have qualified for the GSP if the GSP were still in effect. Customs Automated Commercial System (ACS) will be reprogrammed to accept the SPI "A" with the payment of duty.

Filers using the ABI may reprogram their software so that the SPI "A" can still be used as a prefix to the tariff number, but with the payment of duty. While reprogramming is strictly voluntary, continued use of the SPI "A" has some benefits. One benefit of continued use of the SPI "A" is that the filer will not have to write a letter to Customs requesting a refund if the GSP is renewed with retroactive effect. Use of the SPI "A" will enable Customs to identify affected line items and refund duties without a written request from the importer. In other words, after May 31, 1997, the SPI "A" will constitute an importer's request for a refund of duties paid for GSP line items, should GSP renewal be retroactive.

Other benefits are that ACS will perform its usual edits on the information transmitted by the filer, thereby ensuring that GSP claims are for acceptable country/tariff combinations and eliminating the need for numerous statistical corrections.

This plan was used when the GSP expired on September 30, 1994, and was later renewed with retroactive effect and again when the GSP expired on July 31, 1995, and was later renewed with retroactive effect.

If the GSP expires, the Customs Headquarters-developed computer program will refund all duties deposited for imports that otherwise would have been eligible for GSP duty-free treatment if the GSP is later renewed with retroactive effect. The computer program will identify those entries filed through the Automated Broker Interface (ABI) using the SPI "A" and will be able to process most refunds without requiring further action by ABI filers.

Filers who do not wish to reprogram will be required to request refunds identifying the affected entry numbers in writing if the GSP is renewed retroactively.

ABI filers continuing to use the SPI "A" may use it as they do now (for example, for warehouse entries and for formal consumption entries).

Importers may not use the SPI "A" if they intend to later claim drawback. Use of the SPI "A" is the importer's indication that he wishes to receive a refund if the GSP is renewed retroactively. To claim both this refund and drawback would be to request a refund in excess of duties actually deposited. Importers who are unsure as to whether they will claim drawback are advised not to use the SPI "A". If the GSP is renewed retroactively, and they have not yet claimed drawback, they may request a refund by writing to the port director at the port of entry. If the GSP is not renewed retroactively, they will still have the option of filing a drawback entry.

Continued use of the SPI "A" is not available to non-ABI filers.

Statistics:

For statistical purposes, ACS will internally convert any SPI "A" transmitted via ABI after May 31, 1997, into a SPI "Q". If the GSP is renewed retroactively to that date, Census will convert all "Q" statistics into "A" statistics, thereby ensuring that next year's competitive need limitations under the GSP are accurate. This will also vastly reduce the number of statistical corrections that would have to be done by import specialists.

Refunds:

If the GSP is renewed with retroactive effect, Customs will reliquidate all affected ABI entry summaries with a refund for the GSP line items. Field locations shall not issue GSP refunds except as instructed to do so by Customs Headquarters.

If a filer files an ABI entry summary with the SPI "A", no further action will need to be taken by the filer to request a refund; filing with the SPI "A" constitutes a valid claim for a refund. Refunds for summaries filed without the SPI "A" must be requested in writing. Instructions on

how to request a refund in writing will be issued if the GSP is renewed with retroactive effect.

INFORMAL ENTRIES

Refunds on informal entries filed via ABI on a Customs Form 7501 with the SPI "A" will be processed in accordance with the procedures outlined above.

Baggage declarations and non-ABI informals:

When merchandise is presented for clearance, travelers and importers will be advised verbally or by a written notice that they may be eligible for a refund of GSP duties.

Travelers/importers may write a statement directly on their Customs declarations (CF 6059B) or informal entries (CF 363 or CF 7501) indicating their desire for a refund. If GSP duty-free status is reenacted with a retroactive provision, no further action to obtain a refund will be required on the part of the importer who has written such a statement. Failure to request a refund in this manner does not preclude them from making a timely written request in the future.

Mail entries:

A written notice will be sent to the addressees with the CF 3419A (Mail Entry) informing them that they may be eligible for a refund of GSP duties.

The addressees may submit a claim requesting a refund of GSP duties and return it, along with a copy of the CF 3419A to the appropriate International Mail Branch (address listed on bottom right hand corner of CF 3419A). It is essential that a copy of the CF 3419A be included as this will be the only method of identifying GSP products and ensuring that duties and fees have been paid.

Dated: May 30, 1997.

A.W. TENNANT,
Acting Assistant Commissioner,
Field Operations.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 28, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER AND MEMORANDUM RELATING TO DUTIABILITY UNDER 19 U.S.C. 1466

ACTION: Notice of proposed revocation of vessel repair ruling letter and memorandum.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the dutiability of a radar and satellite communications system under 19 U.S.C. 1466. Customs also proposes to revoke a memorandum which involved a decision on a vessel repair petition submitted pursuant to 19 U.S.C. 1466 with respect to the dutiability of a satellite communications system. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 18, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations end Rulings, Attention: International Trade Compliance Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, Entry and Carrier Rulings Branch, International Trade Compliance Division, (202) 482–6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs intends to revoke a ruling and a memorandum pertaining to the dutiability of certain items under 19 U.S.C. 1466.

19 U.S.C. 1466(a) provides in pertinent part;

> The *equipments*, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an *ad valorem* duty of 50 per centum on the cost thereof in such foreign country. [Emphasis supplied.]

As the above excerpt from 19 U.S.C. 1466(a) indicates, "equipment" is dutiable under 19 U.S.C. 1466(a).

The ruling requester has asked us to rule on the dutiability of a Global Marine Distress and Safety System ("GMDSS"). The requester has cited Ruling 111425 dated June 26, 1991 wherein we held that the installation of a radar system and a satellite communications system was nondutiable under 19 U.S.C. 1466 because the installation of those systems constituted a nondutiable modification of the vessel.

Similarly, in Memorandum 109936 dated April 28, 1989 (which constituted Customs decision on a vessel repair petition), we held that a satellite communications system was nondutiable under 19 U.S.C. 1466 because it constituted a modification of the vessel.

Ruling 111425 and Memorandum 109938 are set forth in Attachments A and B, respectively, to this document.

In Ruling 113798 dated January 9, 1997, we held a GMDSS to be dutiable under 19 U.S.C. 1466 as vessel equipment. Ruling 113798 involved an application for relief with respect to a vessel repair entry which is not involved in the subject ruling request.

We now intend to revoke Ruling 111425 (with respect to a radar system and a satellite communications system) and Memorandum 109936 (only with respect to the satellite communications system ruled on therein) by our proposed determination in the subject ruling that a GMDSS is dutiable under 19 U.S.C. 1466 as vessel equipment. Our proposed revocation of Memorandum 109936 is limited to the satellite and communications system.

Before revoking Ruling 111425 and Memorandum 109936, consideration will be given to any written comments timely received. Proposed Ruling 113947 revoking Ruling 111425 and Memorandum 109936 is set forth in Attachment C to this document.

We note additionally that there have been other vessel repair rulings which have cited Memorandum 109936, but where the documentary evidence was determined to be insufficient to find the pertinent item to be nondutiable under 19 U.S.C. 1466. Insofar as those other rulings suggest that radar systems, satellite communications systems, or the like,

are nondutiable based on the submission of certain documentary evidence, they too are proposed to be revoked.

Finally, we note that there may be past rulings or memoranda on paint which were not disclosed by our review (e.g., such rulings, if any, may have been issued during a time frame when such rulings were not "captured" or placed in any of the electronic rulings retrieval systems). To the degree that there are any such rulings or memoranda that are inconsistent with proposed Ruling 113947, those rulings are proposed to be revoked.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 27, 1997.

JERRY LADERBERG,
Director,
International Trade Compliance Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 26, 1991.
VES–13–18–CO:R:P:C 111425 LLB
Category: Carriers

CHIEF, TECHNICAL BRANCH
COMMERCIAL OPERATIONS
PACIFIC REGION
One World Trade Center
Long Reach, CA 90831

Re: Vessel repair; modification; repair; vessel SYOSSET, V–184; Entry Number C27–0034962–7.

DEAR SIR:

Reference is made to your memorandum at November 21, 1990, which forwards for our consideration the Petition for Review from vessel repair duties filed by counsel on behalf of Mobile Oil Corporation, seeking relief from the assessment of vessel repair duties in connection with the March 14, 1989, arrival of the vessel SYOSSET in the port of Los Angeles, California.

Facts:

The vessel, upon arrival, filed a declaration and entry of vessel repairs as required under section 4.14, Customs Regulations (19 CFR 4.14), reporting work which had been performed in a foreign shipyard. An application for relief from duties sought relief on numerous items for the claimed reason that they involved non-repair-related expenses (modification, cleaning, surveys etc.). Customs Headquarters rendered advice on twenty-two such items in the ruling on case number 110833. These items included the installation of new satellite communications and radar systems (invoice item 613A and 615, respectively).

In ruling on these items we found that, "Items 12 (613A) and 15 (615) detail the installation of a new satellite communication system and radar system, respectively. Normally,

some of the items installed (wiring, for instance) would be considered permanent modifications and the cost of that portion would be duty-free. In this case, however, there is no segregation within the items. Since portions of the items concern the installation at sensitive electronic equipment which would in all likelihood be removed from the vessel during extended lay-up, the entire cost of both items should be considered subject to duty."

Issue:

Whether the evidence presented on appeal cures the deficiencies noted in the record regarding the Application for Relief, to include sufficient cost segregation and evidence of permanency.

Law and Analysis:

Section 466, Tariff Act of 1930, as mended (19 U.S.C. 1466) provides, in pertinent part, for payment of duty in the amount of 50 percent *ad valorem* on the cost of foreign repairs to vessels documented under the laws of the United States to engage in foreign or coastwise trade, or vessels intended to engage in such trade.

Over the course of years, the identification of modification processes has evolved from judicial and administrative precedent. In considering whether an operation has resulted in a modification which is not subject to duty, the following elements may be considered:

1. Whether there is a permanent incorporation into the hull or superstructure of a vessel (see *United States v. Admiral Oriental Line et al.*, T.D. 44359 (1930), either in a structural sense or as demonstrated by the means of attachment so as to be indicative of the intent to be permanently incorporated.
2. Whether in all likelihood, an item under consideration would remain aboard a vessel during an extended layup.
3. Whether, if not a first tine installation, an item under consideration replaces a current part, fitting or structure which is not in good working order.
4. Whether an item under consideration provides an improvement or enhancement in operation or efficiency of the vessel.

In the present matter, the petitioner has submitted additional evidence for consideration. Shipyard invoices are supplied which provide a segregated cost breakdown covering the installation of the radar and communications systems. Also provided to the sworn statement of the Engineering Superintendent for the U.S. Fleet of Mobil Oil Corporation, the person responsible for the supervision of vessel lay-up operations for the company. The statement indicates that the systems are permanently installed on the vessel and, were the vessel to be laid up, the systems would not be removed. Rather, dehumidifier, would be installed on the vessel in order to maintain the systems, in good operational condition during any such lay-up period. These additional submissions satisfy the deficiencies noted in our response to the initial Application for Relief

Holding:

Following a thorough review of the facts and evidence, and after analysis of the law and applicable precedents, we have determined to allow the Petition for Review as specified in the rate and Analysis portion of this decision.

B. JAMES FRITZ
Chief,
Carrier Rulings Branch.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 28, 1989.

VES–13–18–CO:R:P:C 109936 LLB

DEPUTY ASSISTANT REGIONAL COMMISSIONER
COMMERCIAL OPERATIONS DIVISION
New Orleans, LA 70130

From: Director, Regulatory Procedures and Penalties Division

Re: Petition for review, vessel repair Entry Number 86–649331–4, S.S. MORMACSTAR, V–109A.

Reference is made to your memorandum of December 9, 1988, forwarding a petition for the review of our earlier decision regarding this entry, dated October 4, 1988 (case number 109320). The petitioner seeks review of 31 items regarding which relief was denied due either to insufficient evidence to establish that they entailed modifications rather than repairs, or because of the failure to segregate dutiable from non-dutiable cost items on the invoices.

The vessel operator entered into a long-term charter with the U.S. Navy, the terms of which required that the vessel be converted from one service to another. The vessel, a crude oil tanker, was to be altered to store potable water at the remote U.S. facility at Diego Garcia in the Indian Ocean, as well as to provide point to point transport of white petroleum products and accomplish at-sea refueling of military vessels. The major work was performed during the first six-months of the vessel's extended absence from the United States.

Accompanying the petition are voluminous indexed invoices, internal company memoranda, design drawings and specifications, the charter agreement, ABS correspondence, etc. The following items, shown by exhibit number, entry page number, and general description or vender name, are being petitioned:

Exhibit	*Entry Page #*	*Description*
V-A	2	ITT Mackay Division
V-A	2	ITT Mackay Division
I-C	3	Hyundai MIPO Dockyard Co./pp. 79–80/In-port Feed Pump
I-B		p. 81/Forced Draft Fan Controllers
I-I		pp. 85–86/Engineering-In-Port Feed Pump
VI-B		p. 86/Framo Installation
II-A		pp. 88–93/Tank Coating
I-H		p. 102/Installation of Boiler Flue Gas Analyzers and Oxygen Trim Controller
VII-A	4	Eimco Mining Machinery Int'l
I-A	4	Reliance Electric
I-F	4	Union Pump Co.
I-E	4	Port Electric Supply Corp.
I-J	4	Union Pump Co.
IX-C	4	M.P. Tube Works
III	5	Port Electric Supply Corp.
VII-D	5	El Paso Marine Co.
III-C	5	Tomlinson Refrigeration Co.
VII-B	5	Bailey Distributors, Inc.
II-B	5	International Paint (Calif.)
IX-A	5	Merrin Electric
II-C	5	International Paint Korea
IX-B	6	Merrin Electric
VI-A	6	Port Electric Supply Co.
I-D	6	Hydril Company
VIII-C	8	Sperry Marine Systems
IV	10	Kansas of California, Inc.
IV	10	Kansas of California, Inc.
IV	10	Kansas of California, Inc.
VIII-B	10	Hawthorne
VIII-A	3	ITT Grinnel Corporation
I-G	7	Westinghouse Electric Corporation

In what is possibly the most thoroughly documented and best organized vessel repair petition ever reviewed at Headquarters, the petitioner has presented a request for relief addressing the 31 items by grouping them into 9 major categories. These categories are:

I. Modifications to the engineroom for fuel-efficient in-port service.
II. Conversion of ballast tanks to potable water tanks.
III. Electrical cable for refrigerated storage compartment.
IV. Underway fuel transfer system.
V. Satellite communications system.
VI. Cargo segregation pumping system.
VII. U.S.-made spares.
VIII. U.S.-resident labor.
IX. U.S.-purchased repair components.

We will now discuss these, in order:

Category I details extensive additions to the engineroom. The operating contract called for the vessel to have considerable port time in the Indian Ocean, and increased operating efficiency was essential. The new components were permanently installed and did not replace defective or worn parts/materials. They are, therefore, considered duty-free permanent modifications.

Category II details conversion of the vessel's ballast tanks to potable water tanks. The tanks were converted from one service to another by removal of existing tank coatings and the application of special coatings approved by both M.S.C. and U.S. health officials. The fresh water held in storage aboard the vessel was the primary fresh drinking water supply for personnel stationed at the remote facility at Diego Garcia which has no naturally-occurring fresh water supplies. This operation details a permanent modification of the subject portion of the vessel to a new service, and is considered duty-free.

Category III concerns the extensive installation of cabling in the vessel in order to increase its capacity to store refrigerated foods. Because of the remote service location, it was necessary to provide a 90 day cold food supply. The cables purchased were permanently installed and are a duty-free modification.

Category IV concerns the first time installation of a fuel transfer system aboard the vessel which would allow it to refuel others vessels at sea while underway. The installation is permanent and is a duty-free modification.

Category V concerns the purchase and installation of a satellite communications system aboard the vessel. In the past, customs has held such installations to be equipment purchases stating, typically, "Since the applicant has not furnished evidence that this delicate electronic equipment would remain on board were the vessel laid up for a long period, the communication system is considered equipment rather than an addition to the hull fittings." (Ruling letter number 107819 JM, October 28, 1985). In this case, however, such evidence is supplied in the form of three written statements. The first is from the Program Manager for the equipment vendor, Mackay communications and states that the system is designed for permanent installation, is left aboard during lay-up, and is currently aboard most MARAD Ready Reserve Fleet vessels presently in lay-up. The second is from Gastrans, Inc., (apparently a subsidiary company of the petitioner). naming two vessels which have been in lay-up since November 1983, and which have aboard communications systems similar to that here under consideration. The third is from the then Director of Marine Operations for United States Lines, Inc., a sea Captain at 46 years experience who states that the 12 Econships formerly operated by that company had similar systems aboard during lay-up, and that more than a dozen other vessels of which he has personal knowledge had similar systems aboard during lay-ups of three years duration or longer. In light of this evidence, it is our opinion that the petitioner has demonstrated that the system under consideration is a permanent addition to the fittings of the vessel and is duty-free.

Category VI details the purchase and installation of large quantities of electrical cable, and the construction of a reserve hydraulic oil tank as parts of a cargo segregation pumping system. These items are permanently installed modifications and are duty-free.

Category VII concerns spare parts. Extensive invoices and documentation are presented to demonstrate that the items claimed were all of U.S. manufacture and were purchased by and delivered to the owner in the U.S. by various domestic vendors. The items were then delivered to the vessel while it was abroad to be held in reserve, uninstalled, against some potential future need. Since the items have been shown to be of U.S. manufacture and were purchased in the U.S. by the vessel owner, delivered to its U.S. facility and then forwarded

and stored aboard the vessel with no expenditure for foreign labor installation, we find their cost to be remissible under subsection (d)(2) of section 1466.

Category VIII concerns the labor and travel costs associated with having work performed by two U.S.-resident employees of U.S. companies, ITT Grinnell and Hawthorne-Caterpillar. All worksheets, inspection logs, receipts, etc., are in order and the participants', Social Security numbers are supplied. We find these expenses remissible under section 1466(d)(2) since resident labor was used and no foreign materials or parts were used.

Category IX concerns the purchase of parts and materials in the U.S. and their use in repair procedures abroad with the use of non-resident labor. The statute and Customs Regulations are clear on this point, requiring that for remission to be granted an operation must involve the installation by resident or regular crew labor of U.S.-made parts or materials which were purchased in the U.S. by the vessel owner. Unless all of these conditions are met, no relief is warranted. We find that the claims made under this category do not merit a grant of remission.

In summary, the petition for review of our earlier denial is granted as concerns categories I through VIII, and is denied in regard to category IX.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

VES–13–18–RR:IT:EC 113947 GOB
Category: Carriers

THOMAS W. LORD
MANAGER, FLEET SERVICES
SEA-LAND SERVICE, INC.
8000 Carnegie Blvd.
Charlotte, NC 28209–4637

Re: 19 U.S.C. 1466; Global Marine Distress and Safety System ("GMDSS"); Equipment; Ruling 111425 *revoked* with respect to radar and satellite communications equipment; Memorandum 109936 *revoked* with respect to satellite communications system.

DEAR MR. LORD:

This is in response to your ruling request of May 5, 1997 and subsequent correspondence with respect to the installation of Global Marine Distress and Safety Systems ("GMDSS") on the vessels of Sea-Land Service, Inc. ("Sea-Land"). Our ruling follows.

Facts:

In your May 5, 1997 letter you state as follows:

> We hereby request a ruling pursuant to 19 C.F.R Part 177 that certain modifications, described below, to the vessels do not constitute "repairs" under 19 U.S.C. 1466 and are therefore not dutiable under the Tariff Act of 1930 * * *
>
> International Regulations, SOLAS 1992 (Part C), and the Commincations [sic] Act of 1996 requires all ships to have a Global Marine Distress and Safety System (GMDSS) installed onboard by February 1, 1999. The GMDSS equipment consists of a search and rescue transponder, VHF radio with DSC (digital selective calling), MF/HF transceiver with DSC and telex, INMARSAT C satellite communications terminal, NAVTEX receiver, satellite EPIRB (electronic position indicating radio beacon), and waterproof portable VHF radios.
>
> Within the next few months, Sea-Land will begin to install the new system fleet-wide to be in compliance with international and federal regulations. Due to ship schedules,

up to 50 percent of Sea-Land's fleet vessels may be in foreign locations for the installation.

* * * * * * * *

The modification work will basically consist of mounting the GMDSS equipment into a console. The unit is then permanently affixed to the ship's hull by welding the console to the deck. Attached is a statement from the Project Manager Lee Anderson, attesting that the modification will become a permanent incorporation to the ship's structure, and will remain onboard the vessel during any extended lay-up.

In your letter of May 15, 1997 you describe the GMDSS and its installation as follows:

EQUIPMENT: SAILOR AREA A3 GMDSS STATION EQUIPMENT INCLUDES: A. CONSOLE Sailor H2192 three section rack system. This modular console will be pre-wired in Houston, TX with internal interconnecting cables, power supplies, connection boards, etc. for the equipment mentioned below. Also included are the receiver protection units, controls for the emergency light, Volt/Amo meters for indication and control of the battery charger, as well as the battery charger. B. INMARSAT-C SYSTEM * * * C. MF/HF SSB RADIOTELEPHONE WITH DSC * * * D. NARROW BAND DIRECT PRINTING (NBDP) * * * E. VHF/DSC RADIO TELEPHONE SYSTEMS * * * (ONE CONSOLE MOUNTED/ONE BULKHEAD MOUNTED)

INSTALLATION PLAN

STAGE I All equipment, parts, installation materials etc. will be shipped to Radio Holland Houston for prefabrication, wiring, programming and commissioning prior to forwarding to vessels * * * Pre-fabricated consoles will be shipped to and stored at the Radio Holland facilities closest to the port the vessels call * * *

STAGE 2 The second stage will be delivering/placing the prefabricated station onboard with a crane onto the vessels bridge wing. Technicians and dockside personnel will uncrate, fit and permanently install the station on the bridge. All welding, cable running, and antenna mounting will take place at this time during vessels in-port stay * * *

STAGE 3 The third stage * * * is the GMDSS station commissioning. This involves certification of proper operational [sic] of all equipment, verification of all licensing requirement by FCC or designated representative personnel. The existing radio equipment that conformed to the previous FCC license will be secured and tagged. It will be removed at a later date. Following commissioning new FCC license for GMDSS station becomes effective.

In a submission which we received on May 20, 1997, you stated with respect to the console: "The foundation will be welded to the deck. The console is not intended to be removed from the vessel." With respect to the Inmarsat-C System, MF/HF SSB Radiotelephone with DSC, and Narrow Band Direct Printing (NBDP), you stated in that same submission: "All of these parts will be screwed into the console and are not intended to be removed for any purpose, except for required maintenance." Additionally in that submission, you stated with respect to the VHF/DSC Radio Telephone Systems: "One system will be mounted (screwed) into the console and one will be mounted into the bulkhead. These systems are not intended to be removed for any purpose, except for required maintenance."

Issue:

Whether the installation of the GMDSS is dutiable under 19 U.S.C. 1466.

Law and Analysis:

19 U.S.C. 1466(a) provides in pertinent part:

> The *equipments*, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an *ad valorem* duty of 50 per centum on the cost thereof in such foreign country. [Emphasis supplied.]

As the above excerpt from 19 U.S.C. 1466(a) indicates, "equipment" is dutiable under 19 U.S.C. 1466(a).

We had the occasion to rule on GMDSS equipment in Ruling 113798 dated January 9, 1997, wherein we stated:

> Item 911. *GMDSS Installation.* The applicant describes this item as "Global Marine Distress Safety System' and states: "The purpose of this specification is to install new

communication equipment to comply with IMO Assembly Resolution A.283 (VIII) and 1974 SOLAS Convention amendments concerning radio communications for the GMDSS. The new installation provides enhanced search and rescue data for shoreside rescue authorities as well as to other vessels within the immediate area of the distressed ship."

We find that this item is dutiable under 19 U.S.C. 1466 as vessel equipment. The authorities cited with respect to item 908, above, are equally applicable here.

Our discussion in Ruling 113798 with respect to item 908, referenced in the above exerpt concerning item 911, was as follows:

Item 908: *Radar Installation.* The invoice states: "remove existing radar system and install new upgraded system." The applicant states: "The purpose of the new radar installation is to upgrade the navigation equipment on the bridge. The new radar system has the ability to provide electronic charting in addition to enhanced collision avoidance technology. The older radars although still operating could not be modified or upgraded to provide the same level of technology as the new system."

We find that this item is dutiable under 19 U.S.C. 1466 as vessel equipment. This finding is based on the following authorities.

In *Otte v. United States,* 7 Ct. Cust. Appls. 166, T.D. 36489 (1916), the court stated:

> That the Congress intended to distinguish between equipment and the vessel itself is apparent from a reading of the two subsections above quoted. The line of distinction between equipment and the vessel is somewhat difficult to mark.
>
> The question was considered by the Board of Naval Construction, and their report in part reads as follows:
>
> Equipment, used in a general sense, may be defined as any portable thing that is used for, or provided in, preparing a vessel whose hull is already finished for service. It is the furniture of whatsoever nature which is put into a finished ship in equipping her. The Queen's Regulations and Admiralty Instructions give the following definition: "Equipment, in relation to a ship, includes the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing that is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service."
>
> In estimating the displacement of a ship naval constructors use the term "hull and fittings" in contradistinction to "equipment," the fittings of the hull being understood to be any permanent thing attached to the hull which would remain on board were the vessel to be laid up for a long period.
>
> Adopting these definitions, the board is of the opinion that the term "equipment" would not include donkey engines, pumps, windlasses, steam steerers, and other machinery but that it would include anchors, chain cables, boats, life-saving apparatus, nautical instruments, signal lights, and similar articles.

In Ruling 105414 dated May 24, 1982, we stated:

> It should be noted that the fact that a change or addition of equipment is made to conform with a new design scheme, or for the purpose of complying with the requirements of statute or code, is not a relevant consideration. Therefore, any change accomplished solely for these reasons, and which does not constitute a permanent addition to the hull and fittings of the vessel, would be dutiable under section 1466.
>
> Any new areas to the vessel, that is, bulkheads, permanent ballast, decks, staterooms, bars, storerooms, etc., are considered to be qualifying additions to the hull and fittings. Likewise, the extension of existing services into new areas would also be free of duty. This would include piping, air conditioning, ventilation, electrical service, glazing, etc., as well as final finishing for the new areas (such as painting).
>
> On the other hand, among the dutiable operations would be providing furniture for any of the areas (new and old); providing *new electronic navigation equipment;* providing new lifesaving apparatus * * * providing computer apparatus * * * [Emphasis supplied.]

In Memorandum 105807 dated December 28, 1982, we stated:

> The characterization of an article as vessel equipment, as opposed to fittings or hull/structural parts, is manifestly difficult in cases where the article has many of the attributes of both classes cited in the leading cases. For example, because a vessel pitches and rolls when at sea all *radio gear* is securely fastened, yet is classi-

> fied as equipment even when such articles are usually too large to be considered (in ordinary parlance) "portable". [Emphasis supplied.]

[End CIT excerpt from Ruling 113798.]

Sea-Land has not submitted any documentation which would persuade us to change our determination of Ruling 113798 that GMDSS, or GMDSS equipment, is dutiable under 19 U.S.C. 1466. The issue of vessel equipment was thoroughly discussed in Ruling 113798. *See* the excerpt above.

In fact, the Sea-Land correspondence uses the word "equipment" to describe the GMDSS. *See* the excerpts from Sea-Land's correspondence, above.

In its application of the vessel repair statute, the Customs Service has held that modifications, alterations, or additions to the hull and fittings of a vessel are not subject to vessel repair duties. The identification of work constituting modifications vis-a-vis work constituting repairs has evolved from judicial and administrative precedent. In considering whether an operation has resulted in a nondutiable modification, the following factors may be considered:

1. Whether there is a permanent incorporation into the hull or superstructure of a vessel, either in a structural sense or as demonstrated by means of attachment so as to be indicative of a permanent incorporation. See *United States v. Admiral Oriental Line,* 18 C.C.P.A. 137 (1930). However, we note that a permanent incorporation or attachment does not necessarily involve a modification; it may involve a dutiable repair.
2. Whether in all likelihood an item would remain aboard a vessel during an extended lay-up.
3. Whether an item constitutes a new design feature and does not merely replace a part, fitting, or structure that is performing a similar function.
4. Whether an item provides an improvement or enhancement in operation or efficiency of the vessel.

As indicated in the excerpt from Sea-Land's letter of May 5, 1997, above, it has submitted a statement from its Manager, Fleet Services, Technology that "* * * the units will be permanently affixed to the ship's structure. The unit's console will be welded to the ship's deck and will not be intended to be removed, even during a period of extended lay-up."

Sea-Land has submitted a copy of Ruling 111425 dated June 26, 1991, wherein we stated, with respect to a radar system and a satellite communications system:

> In the present matter; the petitioner has submitted additional evidence for consideration. Shipyard invoices are supplied which provide a segregated cost breakdown covering the installation of the radar and communications systems. Also provided is the sworn statement of the Engineering Superintendent for the U.S. Fleet of Mobil Oil Corporation, the person responsible for the supervision of vessel lay-up operations for the company. The statement indicates that the systems are permanently installed on the vessel and, were the vessel to be laid up, the systems would not be removed. Rather, dehumidifiers would be installed on the vessel in order to maintain the systems in good operational condition during any such lay-up period. These additional additional submissions satisfy the deficiencies noted in our response to the initial Application for Relief.

Thus, in Ruling 111425 we found a radar system and a satellite communications system to be nondutiable under 19 U.S.C. 1466.

We find that our determination in Ruling 113798, detailed above, is more directly on point to the subject ruling request than Ruling 111425 in that both Ruling 113798 and the subject ruling request involve GMDSS equipment. Ruling 111425 involved a different system. Further, it is not clear that the "equipment" issue was thoroughly considered In Ruling 111425.

As the above excerpt from Ruling 113798 indicates, it can be difficult to distinguish between equipment of the vessel and the vessel itself. Nevertheless, we believe that GMDSS is clearly distinguishable from items typically considered to be nondutiable modifications, e.g., bulkheads, decks, etc.

Certain of the rulings cited in Ruling 113796 *(See* the excerpt above) are very pertinent to the issue here.

In Ruling 105414, excerpted above, we determined that new navigation equipment was dutiable. The new navigation equipment was distinguished from bulkheads, decks, staterooms, etc.

In Memorandum 105807, we stated that securely fastened radio gear was dutiable under 19 U.S.C. 1466 "even when such articles are usually too large to be considered (in ordinary parlance) 'portable'."

Our determination that GMDSS is equipment dutiable under 19 U.S.C. 1466 is supported by additional authorities.

In Ruling 111711 dated December 17, 1991, where we found electronic equipment to be dutiable under 19 U.S.C. 1466, we stated with respect to equipment:

> A more contemporary working definition might be that which is used under certain circumstances by the Coast Guard; it includes a *system*, accessory, component or appurtenance of a vessel. This would Include *navigational, radio, safety* and, ordinarily, propulsion machinery. [Emphasis supplied.]

In Memorandum 113291 dated May 31, 1995, we stated:

> The term *equipment* is determined to mean something which constitutes an operating entity unto itself. Equipment retains at least the potential for portability. Equipment may be a fixed to a vessel in a non-permanent fashion, such as by means of bolts or other temporary methods, which is a feature distinguishing it from being considered an integrated portion of the hull and superstructure of a vessel. Examples of equipment as defined are seen in such items as winches and generators. [Emphasis in original.]

Webster's Third New International Dictionary (1968; unabridged) defines "equip" as follows.

> (1): to supply with material resources (as implements or facilities): fit out (a ship *equipped* with every mechanical aid to navigation) * * *

The Random House Dictionary of the English Language (1973; unabridged) defines "equip" as follows:

> 1. To furnish or provide with whatever is needed for service or for any undertaking; fit out, as a ship, army, etc. * * *

The same source provides the following synonyms for equipment: apparatus, paraphernalia, gear, accouterment.

As stated above, we find that these authorities are supportive of the determination that GMDSS is equipment dutiable under 19 U.S.C. 1466.

The fact that Sea-Land has provided a statement to the effect that "* * * the units will be permanently affixed to the ship's structure" and that "[t]he unit's console will be welded to the ship's deck and will not be intended to be removed, even during a period of extended lay-up" does not convince us that the GMDSS is a nondutiable modification to the vessel.

We believe it to be clear that, as discussed at length in Ruling 113798, the GMDSS is equipment of the vessel which is dutiable under 19 U.S.C. 1466.

Accordingly, Ruling 111425, discussed above, is revoked. Also revoked is Memorandum 109936 (a decision on a vessel repair petition) with respect to a satellite communications system (held nondutiable in Memorandum 109938). Memorandum 109936 is only revoked with respect to one item therein, a satellite communications system.

We note additionally that there have been other vessel repair rulings which have cited Memorandum 109936, but where the documentary evidence was determined to be insufficient to find the pertinent item to be nondutiable under 19 U.S.C. 1466. Insofar as those other rulings suggest that radar systems, satellite communications systems, or the like, are nondutiable based on the submission of certain documentary evidence, they too are revoked.

Finally, we note that there may be past rulings or memoranda on point which were not disclosed by our review (e.g., such rulings, if any, may have been issued during a time frame when such rulings were not "captured" or placed in any of the electronic rulings retrieval systems). To the degree that there are any such rulings or memoranda that are inconsistent with this ruling, these rulings are revoked.

Holding:

GMDSS is dutiable equipment pursuant to 19 U.S.C. 1466.

As stated above, Ruling 111425 is *revoked* and Memorandum 109936 (only with respect to a satellite communications system) is *revoked*. With respect to this revocation, note also the final two paragraphs of the LAW AND ANALYSIS section of this ruling.

JERRY LADERBERG,
Acting Chief,
Entry and Carrier Rulings Branch.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 3, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

MODIFICATION OF RULING LETTER RELATING TO COUNTRY OF ORIGIN DETERMINATION OF TENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of country of origin ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the country of origin of tents. Notice of the proposed modification was published April 23, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 17.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or before August 18, 1997.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 23, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 17, proposing to modify Headquarter Ruling Letter (HQ) 958802, dated May 9, 1996. That ruling addressed the country of origin of tents composed of materials from two or more countries as per section 102.21(c)(5) of the Customs Regulations (19 CFR 102.21(c)(5)). Section 102.21(c)(5) states that the country of origin is the last country in which an important assembly or manufacturing process occurs. This analysis was based on the assumption that all of the materials comprising the tents were fabric. A review of the file for HQ

958802 revealed that not all of the materials comprising the tent are fabric. In fact, the floor of the tents is made of PE sheet, a plastic. As such two of the six scenarios addressed in HQ 958802 (specifically scenario II and V) are in error.

No comments were received in response to our notice of intent to modify HQ 958802.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HQ 958802 to reflect the proper analysis of the merchandise at issue. HQ 960381 modifying HQ 958802 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: May 28, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 28, 1997.

CLA–2 RR:TC:TE 960381 jb
Category: Classification

WENDY WIELAND MARTIN
KELLWOOD
600 Kellwood Parkway
Chesterfield, MI 63017

Re: Modification of HQ 958802, dated May 9, 1996; country of origin of tents; floor made of PE sheet; 102.21(c)(2); tariff shift.

DEAR MS MARTIN:

On May 9, 1996, this office issued to you Headquarters Ruling Letter 958802 regarding the country of origin of several styles of tents covering six manufacturing scenarios. A review of the file has revealed that contrary to what is stated in the ruling, the floor for the subject tents is made out of PE sheet and not a fabric. Although this change in the facts does not affect all of the country of origin determinations set out in that ruling, scenarios II and V are incorrect. Accordingly, this letter will set out the proper analysis and country of origin determination for those two affected scenarios.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–82, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HQ 958802 was published April 23, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 17.

Facts:

The manufacturing operations discussed in HQ 958802 are as follows:

STYLE NUMBER 8900—BACKPACKING DOME TENT

Scenario I

Country A—material for roof and walls is sourced;
Country B—material for roof and walls is sourced;
Country C—material for floor is sourced;
Country D—cutting, assembly and packaging.

Scenario II

Country A—material for roof and walls is sourced;
Country C—material for floor is sourced;
Country D—cutting, assembly and packaging.

STYLE NUMBER 89001—CABIN TENT

Scenario III

Country A—material for roof and walls is sourced;
Country B—material for walls is sourced;
Country C—material for floor is sourced;
Country D—cutting, assembly and packaging.

STYLE NUMBER 89004—FAMILY SIZE DOME TENT

Scenario IV

Country A—material for roof and walls is sourced;
Country B—material for roof and walls is sourced;
Country C—material for floor is sourced;
Country D—cutting, assembly and packaging.

STYLE NUMBER 89001—CABIN TENT, OR STYLE NUMBER 89004—FAMILY SIZE DOME TENT

Scenario V

Country A—material for roof and walls is sourced;
Country C—material for floor is sourced;
Country D—cutting assembly and packaging.

STYLE NUMBER 89000—BACKPACKING DOME TENT, OR STYLE NUMBER 89001—CABIN TENT, OR STYLE NUMBER 89004—FAMILY SIZE DOME TENT

Scenario VI

Country A—material for roof, walls and floor is sourced;
Country D—cutting, assembly and packaging.

In five of the scenarios addressed in HQ 958802 as the fabric for the tents' roof, walls and floor was formed in two or more countries, a section 102.21(c)(5) (multi-country) analysis was applied which determined that the country of origin of the tents was the country in which the assembly occurred. The determinations in that ruling were premised on the fact that all of the materials which comprised the tents were fabric.

In regard to scenario VI the determination is accurate as all of the fabric and the PE sheet was sourced in Country A, and thus country of origin was conferred in Country A. Similarly, the determinations in scenarios I, III, and IV are accurate as the fabric was sourced in two countries and the PE sheet in a third country, thus, as per section 102.21(c)(5) the country of origin was Country D, that is, the last country in which an important assembly operation occurred.

Scenarios II and V however, where the manufacturing operation for the tents involves fabric for the roof and walls sourced in Country A and PE sheet for the floor sourced in Country C, are incorrect both in the analysis and the determination. This letter serves to rectify these two scenarios.

Issue:

What is the proper country of origin for the tents in scenarios II and V?

Law and Analysis:

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act Section 334 of that Act provides new rules of origin for textiles and apparel entered, or

withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) Through (5) of Section 102.21.

Paragraph (c)(1) states that "The country of origin of a textile or apparel product is the single country, territory, or insular Possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which the foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section"

Paragraph (e) states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:"

6301–6306	The country of origin of a good classifiable under heading 6301 through 6306 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject tents classified in beading 6306, HTSUSA. The tents in scenarios II and V are made of both a fabric and a non-fabric material. As the fabric is formed in a single country, as per the terms of the tariff shift, the country of origin of the tents in scenarios II and V is the country in which the fabric making process occurred, that is, Country A.

Holding:

Accordingly, HQ 958802, dated May 9, 1996, is modified to reflect Country A as the country of origin for the tents in scenarios II and V.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF FROZEN, BROILED EEL FILLETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying two rulings pertaining to the tariff classification of frozen, broiled eel fillets. Notice of the proposed modification was published on April 30, 1997, in the CUSTOMS BULLETIN. No comments were received in response to that publication.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 18, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 30, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 18, a notice of proposal to modify New York Ruling Letter (NYRL) 810216, date May 16, 1995, and NYRL 897665, dated May 23, 1994, which held that frozen, broiled eel fillets products were classifiable, under subheading 1604.20.6010, Harmonized Tariff Schedule of the United States (HTSUS), the provision for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs, other prepared or preserve fish, other, other, pre-cooked and frozen.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL 810216 and NYRL 897665 to reflect the proper classification of the frozen, broiled eel fillets in subheading 1604.19.2000, or 1604.19.8000 HTSUS, which provide for fish, whole or in pieces, but not minced. Classification at the 8 digit level will depend upon whether the eel filets are packed in airtight containers. Headquarters Ruling Letter (HRL) 959210, modifying NYRL 810216, is set forth in "Attachment A" to this document. HRL 959211, modifying NYRL 897665, is set forth in "Attachment B" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 2, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 2, 1997.
CLA-2 RR:TC:FC: 959210 RC
Category: Classification
Tariff No. 1604.19.2000

MR. ROBERT HARTMAN
WILLIAM A. FLEGENHEIMER
11048 South La Cienega Boulevard
Inglewood, CA 90304

Re: Reconsideration and Modification of New York Ruling Letter (NYRL) 810216; Frozen, Broiled Eel Fillets.

DEAR MR. HARTMAN:

This is in reference to NYRL 810216, dated May 16, 1995, issued to you on behalf of Marubeni America Corporation, Seattle, Washington, concerning the classification of frozen, broiled eel fillets. In NYRL 810216, Customs found that the eel was classifiable under 1604.20.6010, HTSUSA, the provision for prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs, other prepared or preserved fish, other, other, precooked and frozen. This letter is to inform you that NYRL 810216 no longer reflects the views of the U.S. Customs Service. The following represents our position and modifies that ruling.

Facts:

The subject merchandise is frozen, broiled eel fillets (Kabayaki Unagi). The eel has been sliced down the middle into fillets and prepared with soy sauce, sugar, rice wine, caramel color, monosodium glutamate, and starch. No oil is added to the product. The product is packaged in airtight containers (vacuum packed).

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NYRL 810216 was published on April 30, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 18.

Issue:

Whether the frozen, broiled eel fillets are classifiable under subheading 1604.19.2000, HTSUSA, as fish, whole or in pieces, but not minced; or under subheading 1604.20.6010, HTSUSA, as other prepared or preserved fish.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Heading 1604, HTSUS, provides for "Prepared or preserved fish * * * whole or in pieces, but not minced." The ENs to heading 1604 indicate that among other items, the heading covers fish prepared or preserved in oil, and that the products remain classified in the heading whether or not they are put up in airtight containers.

Upon review of NYRL 810216, we find that it is incorrect. The frozen, broiled eel fillets are more specifically provided for 1604.19.2000, HTSUSA, as fish, whole or in pieces but not minced rather than in subheading 1604.20.6010, HTSUSA, as other prepared or preserved fish.

Holding:

The frozen, broiled eel fillets fall into subheading 1604.19.2000, HTSUSA, the provision for "Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs:

Fish, whole or in pieces, but not minced: Other (including yellowtail): In airtight containers: Not in oil: Other." Dutiable at 5.2 percent *ad valorem*.

NYRL 810216 is modified.

In accordance with 19 U.S.C. 1625, this ruling will become affective 60 days from its publication in the CUSTOMS BULLETIN, Publication of ruling or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF CUSTOMS RULINGS RELATING TO SUBSTANTIAL TRANSFORMATION OF GOLD CHAIN LINKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letters concerning substantial transformation of gold chain links.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1025(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the assembly (weaving) of gold chain links into chain.

DATE: Comments must be received on or before July 18, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W. Suite 4000, Washington, D.C.

FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the substantial transformation of gold chain links into chain. Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruling Letter (HRL) 556892 dated December 23, 1992, a case involving the eligibility of certain jewelry under the Generalized System of Preferences (GSP), gold links which were a product of Thailand, a beneficiary country under the Generalized System of Preferences (GSP), were exported to non-GSP countries where they were woven together in approximately 18 inch pieces, and then returned to Thailand, where the woven chains were soldered, cut into lengths, clasps attached to make bracelets and/or necklaces, and cleaned and polished. Alternatively, the chains were combined into one continuous length and cleaned. The jewelry products were then exported to the United States. The facts in HRL 556624 are identical with the exception that the woven chains were also soldered in the non-GSP country, and not in Thailand.

In HRL 556892, we stated that weaving links into chain forms the fundamental and essential character of the finished article (bracelet and/or necklace) and dedicates its use as jewelry. Therefore, we found that the weaving operation in the non-GSP countries substantially transformed the links into a new and different "product of" the country where that process occurred. Accordingly, we held in that case that the imported jewelry was not a "product of" Thailand and was thus ineligible for duty-free treatment under the GSP. In HRL 556624, we found that the weaving and soldering operations in the non-GSP country resulted in a substantial transformation of the gold links. Therefore, as in HRL 556892, we held that when imported into the United States, the gold jewelry was not a "product of" Thailand. HRL 556892 and HRL 556624 are set forth as "Attachment A" and "Attachment B", respectively, to this document. Customs is of the opinion that the substantial transformation criteria used for purposes of determining whether an article is a "product of" a GSP country is also applicable for purposes of determining whether an article is a "product of" Israel for purposes of the United States-Israel Free Trade Area Implementation Act of 1985 ("U.S.-Israel FTA").

Customs has reconsidered its position in HRL 556892 and HRL 556624, and is of the opinion that the simple assembly or weaving of gold links into chain, even when coupled with a soldering operation, does not effect a substantial transformation of the gold links. This position is supported by the court's decision in *National Hand Tool v. United States*, Slip Op. 92–61 (April 27, 1992, aff'd, 989 F.2d 1201 (1993).

In *National Hand Tool*, a country of origin marking case, certain hand tool components used to make flex sockets, speeder handles, and flex handles, were imported from Taiwan. The imported components were either cold-formed or hot-forged into their final shape before importation, with the exception of the speeder handle bars, which we reshaped by a power press after importation. In the U.S., the components were subject to heat treatment, which increased the strength of the components, sand-blasting (a cleaning process), and electroplating (en-

abling the components to resist rust and corrosion). After these processes were complete, the components were assembled into the final products, which were used to loosen and tighten nuts and bolts.

The Court of International Trade decided the issue of substantial transformation based on three criteria, i.e., name, character, and use. Applying these rules, the court found that the name of the components did not change after the post-importation processing, and that the character of the articles similarly remained substantially unchanged after the heat treatment electroplating and assembly, as this process did not change the form of the components as imported. The court further pointed out that the use of the articles was predetermined at the time of importation, i.e., each component was intended to be incorporated in a particular finished mechanic's hand tool. Based on this test, the court concluded that the processing in the U.S. did not effect a substantial transformation of the foreign hand tool components.

Consistent with the decision in *National Hand Tool,* we now find in HRL 556892 and HRL 556624, that the operations in the non-GSP countries, consisting of the simple assembly (weaving) of the gold links to form a chain, even when coupled with a soldering operation, do not result in a substantial transformation of these components. The assembly operations do not alter the fundamental character or specific design of the gold links, nor do they affect the uses to which the links may be put. Both before and after the weaving operation, the links are clearly recognizable and dedicated for use as jewelry components in the production of necklaces or bracelets. The assembly of the links represents a continuation of the production process leading to their completion as items of gold jewelry. Consequently, we find that for purposes of the GSP, the imported gold jewelry is a "product of" Thailand, the country where the gold links were produced.

Customs intends to revoke HRL 556892 and HRL 556624 to reflect that the gold jewelry imported from Thailand is a "product of" Thailand, for purposes of determining whether it is entitled to duty-free treatment under the GSP. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling 560333, revoking HRL 556892 and HRL 556624, is set forth as "Attachment C" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 30 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 23, 1992.
CLA–2 CO:R:C:S 556892 RAH
Category: Classification

MR. GARY GLAZER
COMMERCIAL IMPORT AND EXPORT COMPANY
6037 Seward Park Avenue
Seattle, WA 98118

Re: GSP, gold chains; bracelets; weaving; soldering; diamond cutting; substantial transformation; HRL 556624.

DEAR MR. GLAZER:

This is in response to your letters of August 18 and 19, 1992 and September 1, 1992, requesting clarification of Headquarters Ruing Letter 556624 dated July 31, 1992. This ruling concerned the eligibility of gold necklaces and bracelets imported into the U.S. from Thailand for duty-free treatment under the Generalized System of Preference (GSP). Some of the manufacturing (weaving gold links into chain and soldering) occurred outside of Thailand in a non-GSP country.

Facts:

CI&CE imports gold rope chains in varying gauge and lengths as well as gold necklaces and bracelets of gold rope chain. The rope chains, necklaces and bracelets are manufactured from 10K, 14K or 18K gold wire which is produced in Thailand by CI&CE's factory (Chaingmai Chain and Jewelry Company) by melting pure gold bars obtained from Thailand, the United States or Australia with alloys from Thailand. The gold wire is made into links and then woven together into approximately 18-inch pieces. The links are soldered together with the use of gold and cadmium obtained in the United States or Thailand. The 18-inch pieces are then combined to make one continuous length, or alternatively, they are made into necklaces and bracelets. The final processing involves cleaning and polishing.

CI&CE also imports "diamond cut" rope chain necklaces and bracelets. The same manufacturing processes are performed with the additional step of a machine process called diamond cutting which is done after the chain is cleaned.

The production process for the regular rope is as follows:

1. Pure gold bars are melted with alloys to make gold wire;
2. Components are made;
3. Components are woven together in approximately 18 pieces;
4. Components are soldered together;
5. The soldered components are combined to make one continuous length;
6. The chains are then cleaned;
7. The chains are exported, or;
8. The chains are cut into lengths;
9. Clasps are attached and soldered;
10. Finished product is cleaned, polished and exported.

The production process for the diamond cut rope is as follows:

1. Pure gold bars are melted with alloys to make gold wire;
2. Components are made;
3. Components are woven together in approximately 18 pieces;
4. Components are soldered together;
5. The soldered components are combined to make one continuous length;
6. The chains are cleaned;
7. The continuous chain is then put through a machining process called diamond cutting;
8. The chains are cleaned;
9. The chains are exported or;
10. The chains are cut to length;
11. Clasps are attached and soldered;
12. Finished product is cleaned, polished and exported.

With regard to the diamond cutting, the chain is wrapped around a large cylinder mounted on a lath. The cylinder is then frozen and turned at a high speed and a diamond tool does the cutting in the same manner as a traditional lath.

All the manufacturing processes are currently performed in Thailand. In HRL 556624, supra, we addressed the eligibility of the jewelry for GSP if steps 3 and 4 (weaving and soldering) were performed outside of Thailand in a non-GSP eligible country. We held that the weaving and soldering of the links into chain substantially transformed the links into "products of" the country where those operations occurred, and that the remaining steps which were performed in Thailand did not substantially transform the chain into a "product of" the country. You now ask for clarification concerning whether the jewelry will still be eligible for duty-free treatment under the GSP if only step 3 (weaving) is done outside of Thailand.

Bracelets made of regular rope chain and diamond cut rope chain were submitted for our review.

Issues:

Whether, under the circumstances described above, the gold rope chains, necklaces and bracelets from Thailand are entitled to duly-free treatment under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product or manufacture of a designated beneficiary developing country (BDC) which are imported direly into the customs territory of the U.S. from a BDC may receive duty-free treatment if the sum of (1) the cost or value of materials produced in the BDC, plus (2) the direct costs of the processing operation in the BDC, is equivalent to at least 35 percent of the appraised value of the article at the time of entry. See, 19 U.S.C. 2463(b).

The 35 percent value-content and "imported directly" requirements of 19 U.S.C. 2463(b) were conceived as separate and distinct country of origin tests designed to ensure that the benefits of the duty-free program actually accrue to the countries for which they were intended. See, The Trade Act of 1973: Hearings on H.R. 10710 Before the Senate Committee on Finance, 93rd Cong., 2nd Sess. 326 (1974) (statement William D. Eberle, U.S. Special Representative for Trade Negotiations). This goal is accomplished by limiting the opportunities during which non-eligible goods may be commingled with eligible goods. The importer must satisfy both requirements, in addition to the "product of" requirement, in order to receive duty-free treatment of its merchandise.

Thailand is a designated BDC. See, General Note 3(c)(ii)(A), HTSUS. The bracelets and necklaces will be classified under heading 7113, HTSUS. Articles classified under this heading are eligible for GSP. Therefore, the necklaces and bracelets will receive duty-free treatment if they are considered to be the "product of" Thailand, the 35 percent GSP value-content minimum is met, and the goods are "imported directly" into the United States from Thailand.

Merchandise is considered the "product of" a BDC if it either is wholly the growth, product or manufacture of a BDC or has been substantially transformed there into a new or different article of commerce. 19 U.S.C. 2463(b)(2). A substantial transformation occurs "when an article emerges from a manufacturing process with a new name, character, or use which differs from that of the original material subjected to the process." *The Torrington Company v. United States*, 764 F.2d 1568 (Fed. Cir. 1985).

As we stated in HRL 556624, melting down gold bars and mixing with alloys to form wire (steps 1 and 2) constitutes a substantial transformation. HRL 071788 dated April 17, 1938, and HRL 555210 dated April 26, 1989. Furthermore, the conversion of gold wire into links is a substantial transformation. HRL 555929 dated April 22, 1991.

Your primary question is whether the gold links (a product of Thailand) are substantially transformed into a new and different article of commerce in Burma, Laos, Cambodia, Sri Lanka or China, where they will be woven together in approximately 18 inch pieces. In this regard, we find that weaving links into chain forms the fundamental and essential character of the finished article (bracelet and/or necklace) and dedicates its use jewelry. Accordingly, the weaving substantially transforms the links into a new and different "product of" the country where that process occurs.

Next, you ask whether the gold woven chains (now a product of the country where they were woven) are substantially transformed into a "product of" Thailand when exported back to that country. In Thailand, the woven chains are soldered, cut into lengths, clasps attached to make bracelets and/or necklaces, cleaned, polished and exported to the United States. Alternatively, the chains win be combined into one continuous length and cleaned. (See steps 4–12).

It is our opinion that the processes performed in Thailand do not substantially transform the woven chain into a "product of" that country. The essential character of the jewelry is the chain which results from the weaving operation The soldering merely keeps the character of the chain permanently in place. Likewise, soldering closures (i.e., clasps, spring rings) to chains constitutes a simple combining operation for which duty-free treatment under the GSP is not allowed. 19 U.S.C. 2463(b))(2). It is our opinion that the addition of the clasps, cleaning and polishing of the gold chains provides new features thereto but does not change the essence of the chains. The chains are dedicated to use as, and have the essential character of, jewelry pieces such as bracelets and/or necklaces. Furthermore, combining the chains into one continuous length in Thailand and mere cutting to length of the chain does not transform it into a new or different article of commerce. Additionally, Customs has long held that cleaning and polishing operations do not create a new article or alter the intended use of the article. See HRL 556060 dated August 27, 1991.

Finally the diamond catting operation performed on the necklaces, bracelets, and continuous length chains would not substantially transform the articles into "products of" Thailand. We have generally held that cutting or engraving an article for decorative purposes does not result in a substantial transformation of that article. This is also applicable to your case where the chain is wrapped around a large cylinder mounted on a lath and cut with a diamond tool. In rulings addressing this issue, the engraving or decorative cutting operations were performed on partially or nearly completed articles, and, therefore, we determined that the operations were analogous to finishing operations which do not result in a substantial transformation. See HRL 731963 dated July 26, 1989 (hand-faceting of jewelry, a process whereby a worker uses a diamond tipped high-speed rotating wheel to cut away small pieces of silver, does not result in a substantial transformation. See also HRL 043004 dated January 7, 1976, HRL 045106 dated April 22, 1976, and HRL 047663 dated March 21, 1977, each of which held that decorative cutting of wine glasses does not result in a substantial transformation

In summary, although the chains, necklaces and bracelets would be "imported directly" from Thailand, they would not be "products of" that country, as discussed above. Therefore, they would not be eligible for duty-free treatment under the GSP when imported into the United States.

Holding:

Under the facts presented, the finished gold bracelets and/or necklaces "imported directly" into the United States from Thailand are not "products of" that country. Accordingly, they will not be eligible for duty-free treatment under the GSP.

JOHN DURANT,
Director,
Comercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 31, 1992.

CLA–2–CO:R:C:S 556624 RAH
Category: Classification

MR. M. RALPH LATHAM
IMPORT MANAGER
W.J. BYRNES & COMPANY
433 Skinner Building
1326 Fifth Avenue
Seattle, WA 98101–2691

Re: GSP; gold chains; bracelets; weaving; soldering; diamond cutting; costs; substantial transformation.

DEAR MR. LATHAM:

This is in response to your letters of February 4, and 27, 1992, requesting a ruling on behalf of Commercial Import and Export Company (CI&CE).

Facts:

CI&CE imports gold rope chains in varying gauges and lengths as well as gold necklaces and bracelets of gold rope chain. The rope chains, necklaces and bracelets are manufactured from 10K, 14K or 18K gold wire which is produced in Thailand by CI&CE's factory (Chaingmai Chain and Jewelry Company) by melting pure gold bars obtained from Thailand, the United States or Australia with alloys from Thailand. The gold wire is made into links and then woven together into approximately 19-inch pieces. The links are soldered together with the use of gold and cadmium obtained in the united States or Thailand. The is-inch pieces are then combined to make one continuous length, or alternatively, they are made into necklaces and bracelets. The final processing involves cleaning and polishing.

CI&CE also imports "diamond cut" rope chain, necklaces and bracelets. The same manufacturing processes are performed with the additional step of a machine process called diamond cutting which is done after the chain is cleaned.

All the manufacturing processes are currently performed in Thailand. CI&CE is contemplating performing the weaving of the gold links into chain and the soldering of the links outside of Thailand in either Burma, Laos, Cambodia, Sri Lanka or China. The chains would then be returned to Thailand for the remaining operations. CI&CE asks whether, under those circumstances, the merchandise would still be eligible for duty-free treatment under the Generalized System of Preferences (GSP).

Bracelets made of regular rope chain and diamond cut rope chain were submitted for our review.

Issues:

Whether, under the circumstances described above, the gold rope chains, necklaces and bracelets from Thailand are entitled to duty-free treatment under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product or manufacture of a designated beneficiary developing country (BDC) which are imported directly into the customs territory of the U.S. from a BDC may receive duty-free treatment if the sum of (1) the cost or value of materials produced in the BDC, plus (2) the direct costs of the processing operations in the BDC, is equivalent to at least 35 percent of the appraised value of the article at the time of entry. *See,* 19 U.S.C. 2463(b).

The 35 percent value-content and "imported directly" requirements of 19 U.S.C. 2463(b) were conceived as separate and distinct country of origin tests designed to ensure that the benefits of the duty-tree program actually accrue to the countries for which they were intended. *See, The Trade Act of 1973: Hearings on H.R. 10710 Before the Senate Committee on Finance,* 93rd Cong., 2nd Sess. 326 (1974) (statement of William D. Eberle, U.S. Special Representative for Trade Negotiations). This goal is accomplished by limiting the opportunities during which non-eligible goods may be commingled with eligible goods. The importer must satisfy both requirements, in addition to the "product of" requirement, in order to receive duty-free treatment of its merchandise.

Thailand is a designated BDC. *See*, General note 3(c)(ii)(A), HTSUS. Therefore, the articles will receive duty-free treatment it they are considered to be the "product of" Thailand, the 35 percent GSP value-content minimum is met, and the goods are "imported directly" into the United States from Thailand.

Merchandise is considered the "product of" a BDC if it either is wholly the growth, product or manufacture of a BDC or has been substantially transformed there into a new or different article of commerce. 19 U.S.C. 2463(b)(2). A substantial transformation occurs "when an article emerges from a manufacturing process with a new name, character, or use which differs from that of the original material subjected to the process." *The Torrington Company v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985).

It is well established that the first process in Thailand, melting down gold bars and mixing with alloys to form wire to be made into jewelry, constitutes a substantial transformation. HRL 071788 dated April 17, 1984, and HRL 555210 dated April 26, 1989. Furthermore, we have held that conversion of gold wire into links is a substantial transformation. HRL 555929 dated April 22, 1991.

The next question is whether the gold links (a product of Thailand) are substantially transformed into a new and different article of commerce in Burma, Laos, Cambodia, Sri Lanka or China, where they will be woven together in approximately 18 inch pieces and soldered. In that regard, Customs has held that weaving of gold links into a chain and soldering gold chains together result in a substantial transformation. *See*, HRL 555929 dated April 22, 1991.

The gold chains (now a product of the country where they were woven and soldered together) are exported back to Thailand to be cut into lengths, clasps attached, soldered to make bracelets and/or necklaces, cleaned, polished and exported to the United States. Alternatively, the chains will be combined into one continuous length and cleaned. We find that soldering closures (i.e., clasps, spring rings) to chains constitutes a simple combining operation for which duty-free treatment under the GSP is not allowed. 19 U.S.C. 2463(b)(2). It is our opinion that the addition of the clasps, cleaning and polishing of the gold chains provides new features thereto but does not change the essence of the chains. The chains are dedicated to use as, and have the essential character of, jewelry pieces such as bracelets and/or necklaces. Furthermore, combining the chains into one continuous length in Thailand does not result in a substantial transformation. Additionally, Customs has long held that cleaning and polishing operations do not create a new article or alter the intended use of the article. See, HRL 556060 dated August 27, 1991.

Finally, the diamond cutting operation performed on the necklaces, bracelets, and continuous length chains would not substantially transform the articles into "products of" Thailand. We have generally held that cutting or engraving an article for decorative purposes does not result in a substantial transformation of that article. In rulings addressing this issue, the engraving or decorative cutting operations were performed on partially or nearly completed articles, and, therefore, we determined that the operations were analogous to finishing operations which do not result in a substantial transformation. *See*, HRL 731963 dated July 26, 1989 (hand-faceting of jewelry, a process whereby a worker uses a diamond tipped high-speed rotating wheel to cut away small pieces of silver, does not result in a substantial transformation. *See also*, HRL 043004 dated January 7, 1976, HRL 045106 dated April 22, 1976, and HRL 047663 dated March 21, 1977, each of which held that decorative cutting of wine glasses does not result in a substantial transformation.

In summary, although the chains, necklaces and bracelets would be "imported directly" from Thailand, they would not be "products of" that country, as discussed above. Therefore, they will not be eligible for duty-free treatment under the GSP when imported into the United States.

Holding:

Under the facts presented, the finished gold bracelets and/or necklaces "imported directly" into the United States from Thailand are not "products of" that country. Accordingly, they will not be eligible for duty-free treatment under the GSP.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–05 RR:TC:SM 560333 BLS
Category: Classification

AREA DIRECTOR
JFK Airport
Jamaica, NY 11430

Re: Eligibility of certain gold jewelry for duty-free treatment under U.S.-srael FTA; I/A 4/97; substantial transformation; revocation of HRLs 556892 and 556624.

DEAR SIR:

This is in reference to your memorandum dated January 31, 1997, forwarding an internal advice request on behalf of Coloseum Industries Ltd. and Adipaz Ltd. ("Adipaz"), in connection with a claim for duty-free entry of certain jewelry under the United States-Israel Free Trade Area Implementation Act of 1985 ("U.S.-Israel FTA") (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)).

Facts:

The subject jewelry consists of small link gold chains which undergo processing in Israel and in Zimbabwe. The operations performed are as follows:

Operations in Israel

1. Fine gold bullion is imported into Israel.
2. The bullion is squeezed into one long flat piece of gold.
3. The gold is then shredded into small pieces to fit into the crucible (for melting).
4. The gold is weighed and, together with different alloys, is prepared for melting.
5. The gold and alloys are melted into ingots, which become karat gold.
6. The ingots are rolled in a big rolling mill.
7. Intermediate annealing is done in a controlled-atmosphere furnace.
8. Continuous rolling and annealing (to soften the gold) intermittently are done until a wire with a square cross section of 1.2 mm results.
9. Drawing dyes are inserted on the wire (purpose is to size the wire eventually to the correct gauge).
10. The wire is drawn to the required diameter through dyes (stones).
11. The spool of wire rod is degreased and dried.
12. The gold wire rod is squeezed in a large squeezing machine to create a round wire of gold.
13. The wire is annealed.
14. The gold is squeezed to the final gauge in a small squeezing machine.
15. Further annealing is carried out.
16. Aluminum wire is drawn to the required core diameter.
17. The strip of gold and the aluminum core are inserted into a drawing dye and winding spindle with a spindle winding machine. (This places the aluminum core into the gold.)
18. The resulting spiral is sawed with circular saws into separate links.
19. The separate links are fit between flat cylinders to flatten the links into the final shape.
20. The links are sifted from sawdust remains.
21. The links are shipped to Zimbabwe.

Operations in Zimbabwe

22. The individual links are connected together by hand (assembled) and soldered.

Operations Upon Return to Israel

23. The assembled links are returned to Israel in lengths of 33 cm.
24. The 33 cm lengths are further assembled in Israel by adding ten more links and connecting them together to form continuous lengths.
25. These continuous lengths are cut to the required lengths for either neck chains (minimum 45 cm) or bracelets (approximately 22 cm).
26. The ends are cleaned from the cuttings.

27. End links, quality tag and lock are added.
28. The ends are soldered.
29. The chemical department then cleans the chain by:—Sulfuric acid wash—water rinse—Booming (to strip an outside layer of gold off the chain)—Rinsing-Neutralization of the acids-Polishing in a vibrating tumbler—Rinsing-Drying.
30. The jewelry then goes to Quality Control.
31. The jewelry is exported.

Issue:

1) Whether the gold chains are considered to be a "product of" Israel upon importation into the U.S., for purposes of determining whether the jewelry is eligible for duty-free treatment under the U.S.-Israel FTA.

2) Whether the gold chains are considered to be "imported directly" into the U.S. from Israel.

Law and Analysis:

Under the U.S.-Israel FTA, eligible articles which are the growth, product, or manufacture of Israel and are imported directly to the U.S. horn Israel qualify for duty-free treatment or a duty preference, provided the sum of 1) the cost or value of materials produced in Israel, plus 2) the direct costs of processing operations performed in Israel is not less than 35 percent of the appraised value of the article at the time it is entered. *See* General Note 8, Harmonized Tariff Schedule of the United States (HTSUS).

Adipaz contends that the processing in Zimbabwe during which the gold links are assembled (or woven) into chain does not result in a substantial transformation of the Israel-origin gold links. In the alternative, Adipaz argues that upon return to Israel from Zimbabwe, the product is again substantially transformed. Accordingly, Adipaz argues that upon importation into the U.S., the gold jewelry is a "product of" Israel.

"Product Of"

The substantial transformation criteria is used to determine whether an article is a "product of" Israel for purposes of the U.S.-Israel FTA. *See* U.S.-Israel FTA, Annex 3, paragraph 4. A substantial transformation occurs "when an article emerges from a manufacturing process with a new name, character, or use Which differs from that of the original material subjected to the process." *See Texas Instruments, Inc. v. United States v. United States*, 69 CCPA 152, 681 F.2d 778 (1982). *See* also U.S.-Israel FTA, Annex 3.

In Headquarters Ruling letter (HRL) 556892 (December 23, 1992), we addressed the question of whether certain rope-chain jewelry was eligible under the Generalized System of Preferences (GSP) where gold links produced in a GSP country (Thailand) was sent to a non-GSP countries for weaving operations. The woven chains were then returned to Thailand where they were soldered, cut into lengths, clasps attached to make bracelets and/or necklaces, and cleaned and polished. Alternatively, the chains were combined into one continuous length and cleaned. In that case, we stated that weaving links into chain forms the fundamental and essential character of the finished article (bracelet and/or necklace) and dedicates its use as jewelry. Therefore, we found that the weaving operation in the non-GSP countries substantially transformed the links into a new and different "product of" the country where that process occurred. Accordingly, we held in that case that the imported jewelry was not a "product of" Thailand and thus was ineligible for duty-free treatment under the GSP. In (HRL) 556624 July 31, 1992), we addressed a request involving identical operations as in HRL 556892, except that the processing in the non-GSP country also included soldering the links together after the weaving operation.

We have reconsidered our position in HRL's 556624 and 556892, and are of the opinion that the simple assembly or weaving of gold links into chain [even when coupled with soldering] does not effect a substantial transformation of the gold links.

In *National Hand Tool v. United States*, 16 CIT 308, 312 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993), a country of origin marking case, certain hand tool components used to make flex sockets, speeder handles, and flex handles, were imported from Taiwan. The imported components were either cold-formed or hot-forged into their final shape before importation, with the exception of the speeder handle bars, which were reshaped by a power press after importation. In the U.S., the components were subject to heat treatment, which increased the strength of the components, sand-blasting (a cleaning process), and electroplating (enabling the components to resist rust and corrosion). After these processes were complete, the components were assembled into the final products, which were used to loosen and tighten nuts and bolts.

The Court of International Trade decided the issue of substantial transformation based on three criteria, i.e., name, character, and use. Applying these rules, the court found that the name of the components did not change after the post-importation processing, and that the character of the articles similarly remained substantially unchanged after the heat treatment, electroplating and assembly, as this Process did not change the form of the components as imported. The court further pointed out that the use of the articles was predetermined at the time of importation, i.e., each component was intended to be incorporated into a particular finished mechanic's hand tool. Based on this test, the court concluded that the processing in the U.S. did not effect a substantial transformation of the foreign hand tool components.

In HRL 559406 (April 25, 1996), Israeli-origin gold jewelry components of various shapes (diamond cut, squares, rectangles etc.) were exported to Thailand where they were assembled into finished gold jewelry. Citing *National Hand Tool*, we found in that case that the character and use of the finished jewelry was predetermined by the form of the exported components. Noting that the jewelry components' character and shape did not change as a result of the assembly and finishing operations performed in Thailand, we found that the processing in that country did not substantially transform the jewelry components into new and different articles, but rather constituted a continuation of the production process leading to their completion as items of gold jewelry. Accordingly, we held that the articles of gold jewelry were considered to be a "product of" Israel for purposes of determining their eligibility for duty-free treatment under the U.S.-Israel FTA.

Consistent with the foregoing, we find in the instant case that the mere assembly and soldering of the Israeli-origin gold links in Zimbabwe to form a chain does not result in a substantial transformation in Zimbabwe. A new and different article having a new name, character or use, has not been created. The assembly operations in Zimbabwe do not alter the fundamental character or specific design of the gold links, nor do they affect the uses to which the links may be put. Both before and after the weaving operation, the links are dearly recognizable as jewelry components and dedicated to be finished into specific types of jewelry, in this case, necklaces or bracelets. The assembly of the links represents a continuation of the production process leading to their completion as finished gold jewelry. *(See Uniroyal Inc., v. United States,* 542 F. Supp. 1026 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983), where the court held that the assembly of the formed uppers to the soles to form a finished moccasin did not result in a substantial transformation of the formed uppers because the uppers formed the "very essence" of the shoes.) Accordingly, the finished gold jewelry will be considered a "product of" Israel for purposes of the U.S.-Israel FTA.

Imported Directly

Annex 3, paragraph 8, of the U.S.-Israel FTA defines the words "imported directly," as follows:

(a) Direct shipment from Israel to the U.S. without passing through the territory of any intermediate country;

(b) If shipment is through the territory of an intermediate country, the articles in the shipment do not enter into the commerce of any intermediate country while en route to the U.S., and the invoices, bills of lading, and other shipping documents, show the United States as the final destination;

(c) If shipment is through an intermediate country and the invoices and other documentation do not show the U.S. as the final destination, then the articles in the shipment; upon arrival in the U.S., are imported directly only if they:

(i) remain under control of the customs authority in an intermediate country;

(ii) do not enter into the commerce of an intermediate country except for the purpose of a sale other than at retail, provided that the articles are imported as a result of the original commercial transaction between the importer and the producer or the latter's sales agent;

(iii) have not been subjected to operations other than loading and unloading, and other activities necessary to preserve the article in good condition.

The definition of "imported directly" under the U.S.-Israel FTA is very similar to that under the GSP. *See* section 10.175, Customs Regulations (19 CFR 10.175). We have held for purposes of the GSP that merchandise is deemed to have entered the commerce of an intermediate country if manipulated (other than loading or unloading), offered for sale (whether or not a sale actually takes place), or subjected to a title change in the country. See HRL 071575, dated November 20, 1984.

In the instant case, the gold links will be sent to Zimbabwe from Israel for assembly. It is apparent that these operations constitute a manipulation of the merchandise, and accord-

ingly, the merchandise is deemed to have entered the commerce of Zimbabwe. Therefore, the merchandise will be considered to be "imported directly" from Israel only if, upon its return from Zimbabwe, it re-enters the commerce of, and then is directly shipped from, Israel to the U.S.

According to the submission, upon return to Israel, the chains will be subject to further assembly by the addition of ten more links, It will then be cut to length, and will become finished items of jewelry with the addition of end links, locks, and quality tags. The jewelry will then be cleaned and sent to quality control, before exportation to the U.S.

Under these facts, we find that there will be a manipulation of the merchandise in Israel, and thus the gold jewelry is considered to enter the commerce of Israel prior to direct exportation to the U.S. Accordingly, based upon this information, the gold jewelry will be considered to be "imported directly" from Israel into the U.S.

Holding:

1) Israeli-origin gold links exported to Zimbabwe for assembly into gold chain, even when coupled with a soldering operation, do not undergo a substantial transformation as a result of the operations in Zimbabwe. Therefore, for purposes of the U.S.-Israel FTA, the gold chain will be considered a "product of" Israel upon importation into the U.S.

2) The gold chain will enter the commerce of Israel upon return from Zimbabwe. Therefore, the gold jewelry will be considered to be "imported directly" from Israel upon entry into the U.S.

Accordingly, the imported articles will qualify for duty-free treatment under the U.S.-Israel FTA, provided the sum of (a) the cost or value of the materials produced in Israel, plus (b) the direct costs of processing operations performed in Israel is not less than 35 percent of the appraised value of the merchandise at the time of entry. Whether the 35 percent value-content requirement will be met must await actual entry of the merchandise. HRL 556892 and HRL 556624 are hereby revoked as a result of the position in this ruling regarding the substantial transformation of gold links.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 6, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF CUSTOMS RULING LETTERS RELATING TO THE USE OF FOREIGN-BASED TRUCKS IN INTERNATIONAL TRAFFIC

ACTION: Notice of proposed revocation of ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat 2057) this notice advises interested parties that Customs intend to revoke all prior rulings inconsistent with its proposed change in interpretation of the Customs Regulations regarding the admission into the United States of certain foreign-based trucks as instruments of international traffic. It is now Customs position that whether the movement of such vehicles is considered to be international or domestic for purposes of the administration of section 123.14, Customs Regulations (19 CFR 123.14) is dependent upon the origin and destination of the merchandise carried. Such vehicles engaged, in whole or in part, in the carriage of merchandise originating in one country and terminating in another country shall be considered to be engaged in international traffic. In addition, the movement of such vehicles without a payload between two points in the same country shall not be considered a domestic movement. The benefit of this liberalization of current cabotage restrictions inures to both the United States and foreign trucking industries inasmuch as it allows more efficient and economical utilization of their respective vehicles both internationally and domestically.

DATE: Comments must be received on or before August 1, 1997

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service Office of Regulations and Rulings, Attention: Entry and Carrier Rulings Branch, 1301 Constitution Ave-

nue, NW (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Entry and Carrier Rulings Branch, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Glen E. Vereb, Entry and Carrier Rulings Branch, Office of Regulations and Rulings, 202–482–6940 (legal matters), or Eileen Kastava, Cargo Control, Office of Field Operations, 202–927–0983 (operational matters).

SUPPLEMENTAL INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat, 2057), this notice advises interested parties that Customs intends to revoke all rulings inconsistent with its change in interpretation of the Customs Regulations regarding the admission into the United States of certain foreign-based trucks as instruments of international traffic. Customs invites comments on the correctness of the proposed revocation.

Section 141.4(a), Customs Regulations (19 CFR 141.4(a)), provides that entry as required by title 19, United States Code, section 1484(a) (19 U.S.C. 1484)(a)), shall be made of all merchandise imported into the United States unless specifically excepted. Foreign-based trucks are not among those excepted items listed in section 141.4(b) and would therefore be subject to entry and payment of any applicable duty unless otherwise exempted by law or regulations.

Pursuant to 19 U.S.C. 1322, vehicles and other instruments of international traffic shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury. This statutory mandate pertaining to foreign-based trucks is implemented under s. 123.14 of the Customs Regulations (19 CFR 123.14). Section 123.14(a) states that to qualify as instruments of international traffic, trucks having their principal base of operations in a foreign country must be arriving in the United States with merchandise destined for points in the United States, or arriving empty or loaded for the purpose of taking merchandise out of the United States.

Section 123.14(c), Customs Regulations, states that with one exception, a foreign-based truck, admitted as an instrument of international traffic under section 123.14(a), shall not engage in local traffic in the United States. The exception, set out in section 123.14(c)(1), states that such a vehicle, while in use on a regularly scheduled trip, may be used in local traffic that is directly incidental to the international schedule. For purposes of s. 123.14(c), Customs interprets the term "local traffic" as referring to the transportation of passengers or merchandise between any two points in the United States.

Section 123.14(c)(2), Customs Regulations, provides that a foreign-based truck trailer admitted as an instrument of international traffic may carry merchandise between points in the United States on the return trip as provided in section 123.12(a)(2) which allows use for such transportation as is reasonably incidental to its economical and prompt departure for a foreign country.

In regard to these cabotage restrictions, Customs has received a petition from the American Trucking Associations (ATA) requesting a change in Customs interpretation of its regulations governing the use of foreign-based trucks in local traffic in the United States. This petition is the culmination of joint discussions beginning in July of 1994 between the ATA and the Canadian Trucking Association (CTA) to obtain mutually agreed upon parameters with respect to the harmonization of current truck cabotage restrictions in their respective countries.

Accordingly, it is proposed that for purposes of determining whether foreign-based trucks are engaged in "international" or "local" (i.e., domestic) traffic as those terms are used in section 123.14 and are therefore subject to the restrictions provided therein, Customs will look to the origin and destination of the merchandise carried rather than the actual transportation route of the merchandise on the trucks. Such vehicles engaged, in whole or in part, in the carriage of merchandise originating in one country and terminating in another country shall be considered to be engaged in international traffic.

In addition, the movement of such vehicles without a payload between two points in the same country shall not be considered to be local or domestic movement. Before taking this action, we will give consideration to any written comments timely received. Customs intends to revoke all prior rulings inconsistent with this proposed change in interpretation of the Customs Regulations.

Dated: June 6, 1997.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 10, 123, 128, 141, 143, 145, and 148

RIN 1515–AC11

INCREASE OF MAXIMUM AMOUNT FOR INFORMAL ENTRIES TO $2000

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under the current Customs Regulations, shipments of merchandise generally must be valued at $1,250 or less in order to qualify for informal entry procedures. This regulatory value limit reflects the previous statutory maximum that the Secretary of the Treasury could establish by regulation under 19 U.S.C. 1498(a)(1) prior to its amendment by section 662 of the North American Free Trade Agreement Implementation Act which raised the statutory maximum to $2,500. As a consequence of this increase in the statutory maximum, and consistent with the regulatory discretion conferred by the statute to establish a level within that limit, Customs proposes in this document to amend the Customs Regulations to increase the informal entry value limit to $2,000.

DATES: Comments must be received on or before August 8, 1997.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Linda Walfish, Office of Field Operations (202–927–0042).

Legal Aspects: Jerry Laderberg, Office of Regulations and Rulings (202–482–6940).

SUPPLEMENTARY INFORMATION:

BACKGROUND

All merchandise imported into the customs territory of the United States is subject to entry and clearance procedures. Section 484(a), Tar-

iff Act of 1930, as amended (19 U.S.C. 1484(a)), provides that the "importer of record" or his authorized agent shall: (1) make entry for imported merchandise by filing such documentation or information as is necessary to enable Customs to determine whether the merchandise may be released from Customs custody; and (2) complete the entry by filing with Customs the declared value, classification and rate of duty applicable to the merchandise and such other documentation or other information as is necessary to enable Customs to properly assess duties on the merchandise and collect accurate statistics with respect to the merchandise and determine whether any other applicable requirement of law is met. Part 142, Customs Regulations (19 CFR Part 142), implements section 484 and prescribes procedures applicable to most Customs entry transactions. These procedures are referred to as formal entry procedures and generally involve the completion and filing of one or more Customs forms (such as Customs Form 7501, Entry/Entry Summary, which contains detailed information regarding the import transaction) as well as the filing of commercial documents pertaining to the transaction.

As originally enacted, section 498, Tariff Act of 1930 (subsequently codified at 19 U.S.C. 1498), authorized the Secretary of the Treasury to prescribe rules and regulations for the declaration and entry of, among other things, imported merchandise when the aggregate value of the shipment did not exceed such amount, but not greater than $250, as the Secretary shall specify in the regulations. Regulations implementing this aspect of section 498 are contained in Subpart C of Part 143, Customs Regulations (19 CFR Part 143) which is entitled "Informal Entry". The informal entry procedures set forth in Subpart C of Part 143 are less burdensome than the formal entry procedures prescribed in Part 142 of the regulations. For example, if authorized by the port director, informal entry may be effected by the filing of a commercial invoice setting forth a declaration signed by the importer or his agent attesting to the accuracy of the information on the invoice.

Section 206 of the Trade and Tariff Act of 1984 (Public Law 98–573, 98 Stat. 2948) amended section 498 by increasing to $1,250 (but with some exceptions) the maximum dollar amount that the Secretary could prescribe by regulation for purposes of the declaration and entry of imported merchandise. On July 23, 1985, T.D. 85–123 was published in the Federal Register (50 FR 29949) to, among other things, increase to $1,000 the regulatory limit for which informal entries could be filed; the regulatory amendments in this regard involved changes to Subpart C of Part 143 and various other provisions of the Customs Regulations that reflected the $250 informal entry dollar limit, and Customs explained in the background portion of T.D. 85–123 that the new limit would be set initially in the regulations at $1,000, with the option to increase it to $1,250 in the future. On August 31, 1989, Customs published in the Federal Register (54 FR 36025) T.D. 89–82 which amended the Customs Regulations by increasing the limit for which informal entries could be

filed to the maximum $1,250 permitted under section 498 as amended by section 206 of the Trade and Tariff Act of 1984.

Section 662 of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057) amended section 498 by increasing to $2,500 the maximum dollar amount that the Secretary could prescribe by regulation for purposes of the declaration and entry of merchandise. As a result of this further increase in the statutory maximum, and in consideration of the fact that the regulatory limit for informal entries has not been increased since 1989, Customs believes that it would be appropriate to again increase the regulatory limit for informal entries.

Similar to the approach taken in 1985 as indicated above, and noting that the statutory maximum still represents a ceiling but does not preclude adoption of a lower regulatory limit, Customs believes that it would be preferable at this time to take an intermediate step by establishing a new informal entry limit of $2,000, which would be considerably higher than the present $1,250 regulatory limit but still somewhat below the maximum level authorized by statute. Customs believes that adoption of this proposed $2,000 limit would result in the best balance between the revenue and statistical collection and enforcement responsibilities of Customs and the interest of the importing public in having an expanded opportunity to use the less burdensome informal entry procedures. If the proposed new $2,000 informal entry limit is adopted, Customs would still retain the option of proposing a further upward adjustment of the regulatory limit at an appropriate future date, subject to the statutory maximum, after having had an opportunity to evaluate the operational effect of the new $2,000 limit as well as any other intervening change in circumstances that may have an impact on the entry process.

The proposed changes to the regulations set forth in this document involve replacement of references to "$1,250" by references to "$2,000" in the informal entry provisions of Subpart C of Part 143 and in various other provisions within Parts 10, 123, 128, 141, 145 and 148 of the Customs Regulations (19 CFR Parts 10, 123, 128, 141, 145 and 148).

COMMENTS

Before adopting the proposed amendments as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. The proposed regulatory amendments are in response to a statutory change and will have the effect of reducing the regulatory burden on the public. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 10

Customs duties and inspection, Imports, Reporting and recordkeeping requirements.

19 CFR Part 123

Aircraft, Canada, Customs duties and inspection, Imports, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, Vehicles, Vessels.

19 CFR Part 128

Carriers, Couriers, Customs duties and inspection, Entry, Express consignments, Freight, Imports, Informal entry procedures, Manifests, Reporting and recordkeeping requirements.

19 CFR Part 141

Bonds, Customs duties and inspection, Entry of merchandise, Invoices, Release of merchandise, Reporting and recordkeeping requirements.

19 CFR Part 143

Customs duties and inspection, Entry of merchandise, Invoice requirements, Reporting and recordkeeping requirements.

19 CFR Part 145

Customs duties and inspection, Imports, Mail, Postal service, Reporting and recordkeeping requirements.

19 CFR Part 148

Customs duties and inspection, Imports, Personal exemptions, Reporting and recordkeeping requirements.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend Parts 10, 123, 128, 141, 143, 145 and 148 of the Customs Regulations (19 CFR Parts 10, 123, 128, 141, 143, 145 and 148), as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * * * *

2. In § 10.1, the introductory text of paragraph (a) and the first sentence of paragraph (b) are amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for Part 123 is revised to read, and the specific authority citation for § 123.4 continues to read, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1431, 1433, 1436, 1448, 1624.

* * * * * * *

Section 123.4 also issued under 19 U.S.C. 1484, 1498;

* * * * * * *

2. In § 123.4, the first sentence of paragraph (b) is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

PART 128—EXPRESS CONSIGNMENTS

1. The authority citation for Part 128 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1484, 1498, 1551, 1555, 1556, 1565, 1624.

2. In § 128.24, paragraph (a) is amended by removing the reference "$1250" wherever it appears and adding, in its place, the reference "$2,000".

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Subpart F also issued under 19 U.S.C. 1481;

* * * * * * *

2. In § 141.82, paragraph (d) is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

PART 143—SPECIAL ENTRY PROCEDURES

1. The authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. In § 143.21, paragraph (a), the first sentence of paragraph (b), and paragraphs (c), (f) and (g) are amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

3. In § 143.22, the second sentence is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

4. In § 143.23, paragraphs (d) and (i) are amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

5. In § 143.26, the heading and text of paragraph (a) are amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

Section 145.4 also issued under 18 U.S.C. 545, 19 U.S.C. 1618;

* * * * * * *

Section 145.12 also issued under 19 U.S.C. 1315, 1484, 1498;

* * * * * * *

Section 145.35 through 145.38, 145.41, also issued under 19 U.S.C. 1498;

* * * * * * *

2. In § 145.4, paragraph (c) is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

3. In § 145.12, paragraphs (a)(2), (a)(3) and (b)(1) and the heading and text of paragraph (c) are amended by removing the reference "$1,250" wherever it appears and adding, in its place, the reference "$2,000".

4. Section 145.35 is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

5. Section 145.41 is amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States).

* * * * * * *

2. In § 148.23, the heading and text of paragraph (c)(1) and the heading and introductory text of paragraph (c)(2) are amended by removing the reference "$1,250" and adding, in its place, the reference "$2,000".

GEORGE J. WEISE,
Commissioner of Customs.

Approved: April 25, 1997.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 9, 1997 (62 FR 31383)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–60)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL SALARIED, MACHINE & FURNITURE WORKERS, AND THE INDUSTRIAL UNION DEPARTMENT (AFL-CIO), PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SAMSUNG ELECTRONICS CO., LTD., DEFENDANT-INTERVENOR

Court No. 97–02–00210

[Premature challenge to changed circumstances review dismissed.]

(Dated May 20, 1997)

Collier, Shannon, Rill & Scott, PLLC, (Jeffrey S. Beckington and *Mary T. Staley)* for plaintiffs.

Cullen & O'Connell (Paul D. Cullen, Sr.) co-counsel for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer* and *Ronald G. Morgan), Elizabeth C. Seastrum* and *David Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Akin, Gump, Strauss, Hauer & Feld, L.L.P., (Warren E. Connelly, Margaret K. Minister and *Katherine M. Ho)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* Plaintiffs seek a preliminary injunction of the United States Department of Commerce's changed circumstances review of an antidumping duty order issued against Samsung Electronics Co., Ltd. *See Color Television Receivers from Korea*, 49 Fed. Reg. 18,336, 18,337 (Dep't Commerce 1984) (antidumping duty order). Defendants oppose grant of the injunction and seek dismissal of the action for lack of jurisdiction.

Upon completion of the review, pursuant to 28 U.S.C. § 1581(c), this court will have jurisdiction to review all of plaintiffs' grievance. *See* 28 U.S.C. § 1581(c)(1994). Plaintiffs are fully participating in the review and have access to documents they assert should have been served on them earlier. If the proceeding was not authorized under the regulations

and the results are adverse to plaintiffs the court may reject the results thereof. Plaintiffs have asserted no cognizable harm arising from initiation of the proceeding and have not established that their remedies under 28 U.S.C. § 1581(c) are inadequate. Thus 28 U.S.C. § 1581(i) jurisdiction is unavailable. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988) (Manifest inadequacy of other provisions of 28 U.S.C. § 1581 is prerequisite to 28 U.S.C. § 1581(i) jurisdiction.).

These factors, together with plaintiffs' seven months delay, would also militate against exercise of 28 U.S.C. § 1581(i) jurisdiction, if it were available, until administrative remedies were exhausted. *See* 28 U.S.C. § 2637(d) (1994) (court may require exhaustion where appropriate). The court also notes that as a result of initiation of the changed circumstances proceeding Commerce has the opportunity to address the likelihood of future dumping without the alleged technical impediments of other regulatory avenues, simultaneously with the domestic parties requested anticircumvention review. *See Samsung Electronics Co., Ltd. v. United States*, 946 F. Supp. 5, 10 (CIT 1996) (declining to order revocation decision in advance of consideration of related issues). Similarly, this is not the juncture for court action. This action is dismissed.

(Slip Op. 97–61)

THK AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00350
[Slip Op. 97–34]

(Dated May 19, 1997)

ORDER

TSOUCALAS, *Judge:* Upon reading defendant's motion to amend the judgment order to allow for the payment of interest from the date the counterclaim was first asserted; upon consideration of plaintiff's response; upon consideration of other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion shall be and hereby is granted, and that the judgement order in Slip Op. 97–34, is hereby amended by adding the following after the last paragraph of the present judgment order, as per attachment A:

> ORDERED, that plaintiff pay to the defendant all of the increases in duty assessed upon reliquidation of the entries encompassing the parts of LMGs, which is the subject of the counterclaims, including interest in accordance with 28 U.S.C. § 1961(a) and (b), from the date the answer asserting the counterclaims was filed until the date

the additional duties are paid, said interest to be calculated in accordance with 26 U.S.C. § 6621. The counterclaim with respect to the entries covered by Court No. 94–06–00350 was first asserted on March 2, 1995, when the answer was filed.

(Slip Op. 97–62)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–02–00216

(Dated May 27, 1997)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of plaintiffs' motion for expedited remand to correct clerical errors and defendant's cross-motion for leave to correct an additional clerical error, it is hereby

ORDERED that the plaintiffs' motion and defendant's cross-motion are granted; and it is further

ORDERED that this case is remanded to the U.S. Department of Commerce to

A. Correct its computer program with respect to the final results for NSK in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed Reg. 2081 (Jan. 15, 1997), as follows:

1. Include REBATE2H in the DISCREBH amount deducted from the calculation of home market Net Price;

2. Calculate credit for constructed value separately by class of merchandise;

3. Calculate constructed value credit by converting the yen values to U.S. dollars once only;

4. Rename variable PARTNUMB as PARTNUM; and

5. Multiply the entered value for sampled U.S. sales by the weighting factor only once when calculating importer-specific duty rates;

B. Recalculate NSK's margins following the correction of the above clerical errors; and

C. File the remand results within 30 days of the date this order is entered.

(Slip Op. 97–63)

RHP BEARINGS LTD., ET AL., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–02–00217

(Dated May 27, 1997)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of plaintiffs' motion for expedited remand to correct clerical errors and defendant's cross-motion for leave to correct an additional clerical error, it is hereby

ORDERED that the plaintiffs' motion and defendant's cross-motion are granted; and it is further

ORDERED that this case is remanded to the U.S. Department of Commerce to

A. Correct its computer program with respect to the final results for NSK-RHP in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed Reg. 2081 (Jan. 15, 1997), as follows:

1. Calculate credit for constructed value separately by class of merchandise;

2. Calculate constructed value credit by converting the pound sterling values to U.S. dollars once only;

3. Sample cylindrical roller bearings sales correctly;

4. Include credit insurance in calculating DSELCOP;

5. Weigh the values for total home market selling expenses (TOTSELLH) and total home market movement expenses (TOTMOVEH) by a factor of two to establish uniform weighting of home market expenses;

6. Apply the default credit period for those U.S. sales missing payments dates to net selling price (defined as the original selling price less billing adjustments and rebates); and

7. Multiply the entered value for sampled U.S. sales by the weighting factor only once when calculating importer-specific duty rates;

B. Recalculate NSK-RHP's margins following the correction of the above clerical errors; and

C. File the remand results within 30 days of the date this order is entered.

(Slip Op. 97–64)

SNR ROULEMENTS, PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–02–00304

(Dated May 27, 1997)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of the Partial Consent Motion of Plaintiff SNR Roulements ("SNR") for expedited remand to correct clerical errors and the entire record herein, it is hereby

ORDERED that the plaintiff's motion is granted; and it is further

ORDERED that the Department of Commerce, International Trade Administration ("ITA"), is directed to correct the following clerical errors contained in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.; Amended Final Results of Antidumping Duty Administrative Reviews,* 62 FR 14391 (March 26, 1997);

(1) Deletion of (OBS=50) instruction at Line 1054 of SAS program,

(2) Deletion of dindirsu and dinvcaru from array instruction at Line 809 of SAS program, and

(3) Substitution of HMTOTCOP for TOTVAL as the denominator in the calculation of CREDRAT; and it is further

ORDERED that ITA shall publish Amended Final Results incorporating these corrections in the Federal Register within thirty (30) days of the entry of this order.

(Slip Op 97–65)

UNITED STATES, PLAINTIFF *v.* ONE PLUS ONE KID'S WEARS, KENNY TAN, YVONNE CHAN, AND AMERICAN BONDING CO., DEFENDANTS

Court No. 95–06–00800

(Dated May 27, 1997)

ORDER

DICARLO, *Senior Judge:* Upon consideration of Plaintiff's motion for default judgment, it is hereby

ORDERED that Plaintiff's motion is hereby granted; and it is further

ORDERED that judgment is entered in favor of the United States against the defendants One Plus One Kid's Wears and Kenny Tan in the

sum of $101,770.50 in civil penalties and $16,445.84 in lost duties with interest at the rate established pursuant to 28 U.S.C. § 1961 (a) and (b) from the 27th day of May, 1997.

(Slip Op. 97–66)

KUANG YI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–12–01668

Plaintiff, Kuang Yi, Inc., moves for summary judgment pursuant to Rule 56 of the Rules of this Court. Plaintiff claims entitlement to interest payments from the United States Customs Service. Defendant cross-moves for summary judgment for an order dismissing this case.

Held: Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment for an order dismissing this action for lack of subject matter jurisdiction is granted.

[Plaintiff's motion denied; defendant's cross-motion granted; case dismissed.]

(Dated May 27, 1997)

Peter S. Herrick for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); of counsel: *Sheryl A. French*, Office of the Assistant Chief Counsel, United States Customs Service, for defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, Kuang Yi, Inc., moves pursuant to Rule 56 of the Rules of this Court for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing this case.

Plaintiff claims entitlement to interest payments from the United States Customs Service ("Customs") on refund checks issued by Customs for entries liquidated in 1990 and reliquidated in 1995. Defendant cross-moves for dismissal claiming the Court lacks jurisdiction to decide plaintiff's claim and, in the alternative, that Customs is not liable for interest on refunds in this case.

UNDISPUTED FACTS

The parties agree that there is no genuine dispute as to any material fact.[1] Plaintiff imported artificial flowers through the port of Los Angeles between April 2, 1990 and August 30, 1990 under subheading 6702.90.60 of the Harmonized Tariff Schedule of the United States ("HTSUS"), at a duty rate of 17% *ad valorem*. The subject entries were liquidated on November 2, 1990, under subheading 6702.90.40,

[1] The Court has compiled this statement of undisputed facts from plaintiff's and defendant's statements of undisputed facts, respectively.

HTSUS, at a rate of 9% *ad valorem*. On November 5, 1990, Customs mailed duty refund checks to the address of plaintiff contained in Customs' importer records file. The original refund checks were never cashed.

On June 7, 1991, more than 90 days after liquidation, plaintiff filed protests contesting the liquidation of the subject merchandise. Customs denied the protests on June 28, 1991 and July 15, 1991, noting that the requested action, rate reduction under the HTSUS, was taken at the time of liquidation. By letter dated June 28, 1991, plaintiff requested that defendant issue refund checks which resulted in the initiation of a check trace. On September 18, 1991, the original refund checks were canceled and credited to funds appropriated for duty refunds.

Further inquiry from plaintiff and a request for reliquidation resulted in an investigation of the status of the original refund checks in 1994 and 1995. On December 7, 1995, plaintiff commenced this action claiming that Customs never issued the required refund checks. After reliquidation on December 29, 1995, replacement checks were finally issued on January 2, 1996.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there remain any genuine issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Once the court determines that no genuine issue of material fact exists, summary judgment is properly granted when the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). In the case at bar, this Court finds there are no genuine issues of material fact, the dispositive issues to be resolved are legal in nature and, therefore, summary judgment is proper.

JURISDICTION

Defendant contests plaintiff's assertion of 28 U.S.C. § 1581(i) (1994) as a basis for jurisdiction. First, defendant asserts that plaintiff's claim is not a customs-related claim, but, rather, one involving the United States Treasury rules for issuing substitute checks. Second, defendant emphasizes that since plaintiff's original claim in this action—issuance of substitute checks with interest—is moot, the Court lacks jurisdiction to hear this case. Def.'s Mem. Supp. Cross-Mot. Summ. J. at 3–4.

In response, plaintiff argues that despite the fact that the issuance of replacement checks rendered the claim for recovery of the excess refund moot, this Court has jurisdiction to decide the claim for disgorgement of the benefits received by defendant from plaintiff's assets. According to plaintiff, the remaining issue arises out of laws providing for revenue from imports and falls within the parameters of the residual jurisdiction of this Court. Pl.'s Reply to Def.'s Cross-Mot. Summ. J. at 4.

Section 1581(i) of Title 28, United States Code, is the residual jurisdictional provision of this court, and states the following in pertinent part:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section * * * the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

The Court of Appeals for the Federal Circuit has acknowledged that § 1581(i) was "intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994). In determining the jurisdiction of this Court pursuant to § 1581(i), however, the Court must stay within the parameters of the statute. *See id.* at 1589; *see also K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 189 (1988).

The present action is not one arising out of federal statutes governing import transactions. Once Customs liquidated the entries at the appropriate rate, issued duty refund checks to the address of record and denied plaintiff's protest, Customs performed its duties under the statute governing importations. Subsequent events included a prolonged process of tracing the original refund checks and issuing substitute checks. The issuance of substitute checks is governed by 31 U.S.C. § 3331 (1994). Section 3331 addresses the need for substitute checks to replace original checks "drawn by an authorized disbursing official or agent of the United States Government." 31 U.S.C. § 3331(a)(1)(C). Clearly, the statute is not limited to checks issued by Customs for duty refunds but, rather, encompasses funds disbursed by various agencies of the United States. In other words, plaintiff's dispute involves the Secretary of Treasury's procedure for issuing replacement checks rather than Customs' actions regarding the importation of merchandise. The issuance of the replacement checks did not in any way change the original duty rate assessed by Customs. Plaintiff's claim of entitlement to interest arises out of the delay of Treasury's issuance of substitute checks and, therefore, the merits of this case do not involve interpreting any area of international trade law. As such, the Court does not possess jurisdiction over this action.

CONCLUSION

In accordance with the foregoing opinion, the Court concludes that it does not possess jurisdiction over this action. Accordingly, this case is dismissed.

(Slip Op. 97–67)

SAARSTAHL AG, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND INLAND STEEL BAR CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–04–00219

Plaintiff moves for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2, arguing the Department of Commerce's *Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 58 Fed. Reg. 6,233 (Dep't Comm. 1993) as modified by *Remand Determination: Certain Hot Rolled Lead and Bismuth Steel Products From Germany* (dated Oct. 12, 1993) is not supported by substantial evidence on the record and is not otherwise in accordance with law.

Plaintiff Saarstahl AG also moves for oral argument on the issues remaining undecided after this Court's final judgment in *Saarstahl AG v. United States*, 939 F. Supp. 898 (CIT September 3, 1996). Plaintiff maintains oral argument is necessary due to the amount of time that has elapsed since the issues in this case were last briefed and due to the issuance of relevant decisions by this Court and the United States Court of Appeals for the Federal Circuit.

Defendant-Intervenor also moves for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2, arguing the Department of Commerce's *Final Affirmative* and *Remand Determinations*, are contrary to departmental practice, are not supported by substantial evidence on the record and are not otherwise in accordance with law.

Defendant argues the Department of Commerce's *Final Affirmative* and *Remand Determinations* are supported by substantial evidence on the record and are otherwise in accordance with law, except with respect to the calculation of an uncreditworthy discount interest rate used to determine whether certain grants received by Saarstahl are countervailable. Defendant seeks a remand for reconsideration of this issue.

Held: Commerce's determination in Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany, 58 Fed. Reg. 6,233 (Dep't Comm. 1993) as modified by Remand Determination: Certain Hot Rolled Lead and Bismuth Steel Products From Germany (dated Oct. 12, 1993) is sustained on all issues with the exception of Commerce's calculation of an uncreditworthy discount rate for Saarstahl. The Court remands this issue to Commerce for reconsideration. This Court denies Saarstahl's Motion for Oral Argument.

(Dated May 29, 1997)

LeBoeuf, Lamb, Leiby & MacRae (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel: on Saarstahl's Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record and Response of Saarstahl AG to the Motion for Judgment on the Agency Record of Inland Steel Bar Company), Washington, D.C., *Grunfeld, Desiderio, Lebowitz & Silverman* (Max F. Schutzman, David L. Simon, Jeffrey S. Grimson: on Reply Brief of Saarstahl AG), New York, N.Y., *deKieffer & Horgan* (J. Kevin Horgan, Marc Montalbine: on Saarstahl's Comments on Remand Determination), Washington, D.C., counsel for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Jus-

tice, *(A. David Lafer and Jeffrey M. Telep); Marguerite Trossevin,* Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, counsel for defendant.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martin III, Brian E. Rosen), Washington, D.C., counsel for defendant-intervenor.

OPINION

CARMAN, *Chief Judge:* Before the Court are motions for Judgment on the Agency Record made by plaintiff Saarstahl AG ("Saarstahl") and defendant-intervenor Inland Steel Bar Company ("Inland") pursuant to U.S. CIT R. 56.2. Plaintiff argues the Department of Commerce's ("Department" or "Commerce") decision in *Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany,* 58 Fed. Reg. 6,233 (Dep't Comm. 1993) *("Final Affirmative Determination"* or *"Certain Hot Rolled Lead")* as modified by *Remand Determination: Certain Hot Rolled Lead and Bismuth Steel Products From Germany* (dated Oct. 12, 1993) *("Remand Determination")* is unsupported by substantial evidence on the record and is not otherwise in accordance with law.

Saarstahl also previously moved for oral argument on the non-privatization issues remaining undecided after the issuance of this Court's opinion in *Saarstahl AG v. United States*, 939 F. Supp. 898 (CIT 1996) *("Saarstahl II").*[1] Saarstahl claimed oral argument is "vitally important because of the significant amount of time which has transpired since the issues in the case were last briefed" and because of the issuance of decisions relevant to this proceeding by this Court and the United States Court of Appeals for the Federal Circuit ("CAFC") during that time. (Pl.'s Mot. for Oral Arg. or Alt. for Supp. Brief. at 1.) In *Saarstahl AG v. United States*, 949 F. Supp. 863 (CIT 1996) *("Saarstahl III"),* this Court reserved decision on plaintiff's Motion for Oral Argument as to issues remaining undecided after this Court's decision in *Saarstahl II.* In this opinion, therefore, this Court will review Commerce's *Final Affirmative Determination* as modified by the *Remand Determination* with respect to issues not pertaining to privatization or allocation, because, as explained below, this Court has addressed those issues in previous opinions.[2]

Plaintiff raises three challenges to the *Final Affirmative Determination.* Plaintiff argues: (1) the contingent repayment obligations at issue were not loans, (2) Commerce erred in calculating the value of the contingent repayment obligations, and (3) Commerce's determination that the private banks' debt forgiveness was a countervailable subsidy is not supported by substantial evidence on the record and is otherwise not in accordance with law.

---

[1] Saarstahl moved alternatively for supplemental briefing on the issues remaining undecided after *Saarstahl II,* but this Court denied Saarstahl's motion in *Saarstahl v. United States*, 949 F. Supp. 863 (CIT 1996) *("Saarstahl III").* In that opinion, the Court indicated it would accept a timely application should the parties wish to renew their application for supplemental briefing. *Id.* at 870. The parties have not done so.

[2] *See infra, Section C* and *D* for an overview of this Court's decisions addressing the issue of privatization and allocation.

Defendant-Intervenor also moves for Judgment on the Agency Record, arguing Commerce's *Final Affirmative Determination* and *Remand Determination* are not supported by substantial evidence on the record. Defendant-Intervenor argues Commerce erred when it allocated subsidies received by Saarstahl over the total sales of DHS. Defendant-Intervenor also seeks a remand for a redetermination (1) finding Saarstahl uncreditworthy in 1989, in accordance with *Certain Hot Rolled Lead and Bismuth Carbon Products From Brazil, France, Germany and the United Kingdom*, 57 Fed. Reg. 42,471 (Dep't Comm. 1992) (prelim. determ.) ("*Preliminary Determination*"), and adding an uncreditworthiness premium to the discount rate used to calculate the countervailing duty margin.

Defendant argues Commerce's *Final Affirmative* and *Remand Determinations* are supported by substantial evidence on the record and are otherwise in accordance with law, and requests this Court sustain Commerce's determinations except with respect to calculation of the discount rate. Defendant requests this Court remand this issue to Commerce with instructions to reconsider the discount rate in light of Saarstahl SVK's creditworthiness.

The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

A. *Factual Background:*

From the mid-1970s through the mid-1980s, the European steel industries, in general, and the Saarland steel industries in particular, suffered tremendously as a result of the steel crisis caused by the decline in demand and reduced prices for steel. Between 1978 and 1985, Saarstahl Volklingen GmbH ("Saarstahl SVK"), a German steel company,[3] received various subsidies and assistance from the German federal government ("GOG") and the Saarland state government ("GOS") stemming from a Restructuring Plan adopted by the federal and state governments in 1978 to restore competitiveness to Saarstahl SVK and to create a viable steel industry in the Saarland. The subsidies took the form of guaranteed loans, government funds, and the assumption of principal and interest payments. The federal and state governments also guaranteed loans made to Saarstahl by private banks which would not have made such loans without the government guarantees. Assistance provided to Saarstahl was used to modernize the company, make capital investments and cover operating and employee expenses pursuant to a number of Saarstahl restructuring plans. All of the assistance contained a repayment obligation known as "Rückzahlungsverpflich" or "RZV," which obligated Saarstahl SVK to repay the governments if the company returned to profitability. By 1989, Saarstahl SVK had accumulated DM 3.948 billion in repayment obligations to both governments.

[3] Saarstahl is a producer of long products, such as steel bars and rods in Germany's Saarland region.

Until 1986, Saarstahl SVK was wholly owned by Arbed Luxembourg ("Arbed"), a Luxembourg state-owned company. By 1985, Arbed was no longer able or willing to function as the owner of Saarstahl. Because of the importance of Saarstahl to the local economy, the GOS decided to search for a new owner to replace Arbed. In 1986, in order to facilitate finding a new investor for Saarstahl, Arbed transferred 76 percent of its ownership of Saarstahl SVK to the GOS for DM 1. Usinor-Sacilor, a French company which owned German steel producer AG der Dillinger Huttenwerke ("Dillinger"), also expressed interest in purchasing Saarstahl SVK, but only on the condition Saarstahl was relieved of its debt burden. At the time, Dillinger and Saarstahl SVK were already partners in a joint venture company which produced pig iron.

On April 20, 1989, the GOS reached an agreement with Usinor-Sacilor to merge Saarstahl SVK with Dillinger. On June 15, 1989, Saarstahl SVK's name was changed to DHS-Dillinger Hütte Saarstahl AG ("DHS") and all assets and liabilities of Saarstahl SVK were transferred to DHS. Saarstahl SVK's legal form also changed from "GmBH," a limited liability corporation, to "AG," a German stock company. In exchange for Saarstahl SVK's assets and a capital contribution of DM 145.1 million, the GOS received a 27.5 percent ownership interest in Saarstahl AG. Arbed received a 2.5 percent ownership interest in Saarstahl AG in exchange for a capital contribution of DM 8.9 million and its shares of Saarstahl. Usinor-Sacilor's in-kind contribution of all of its shares of Dillinger was valued at DM 417.3 million and resulted in a 70 percent ownership interest in the newly-formed DHS. Usinor-Sacilor conditioned this agreement upon the federal and Saarland state governments' forgiveness of all of Saarstahl SVK's RZVs.

On June 30, 1989, DHS transferred the former Saarstahl SVK's leadbar assets and liabilities to a newly formed subsidiary, Saarstahl AG ("Saarstahl"). As a result of these events, DHS became a holding company with two operating subsidiaries, Saarstahl AG and Dillinger, and was owned 70 percent by Usinor Sacilor, 27.5 percent by the GOS and 2.5 percent by Arbed.[4] The result of the combination for Saarstahl was that it had been privatized in an arm's-length market transaction which involved a change from ownership and control by the GOS to majority ownership by private interests. *See Remand Determination* at 2.

Pursuant to the merger agreement and as a condition for sale, the GOG and GOS entered into an agreement concerning the previous assistance received by Saarstahl SVK. Under this agreement, all outstanding repayment obligations for the funds provided to Saarstahl SVK, as well as the additional rights held by both governments for the repayment of the principal on the guaranteed loans, were forgiven and relinquished. At the request of the governments, private banks also forgave a portion of the debt owed to them by Saarstahl SVK.

---

[4] DHS owned 100 percent of Saarstahl AG and 95 percent of Dillinger. Both Saastahl AG and Dillinger had profit and loss agreements with DHS under which they were to transfer any profits to DHS and DHS was required to assume any losses incurred by Dillinger and Saarstahl AG.

B. *Countervailing Duty Investigation:*

Commerce initiated a countervailing duty investigation of Saarstahl on May 8, 1992, based on a petition filed by Inland Steel Bar Company and Bethlehem Steel Corporation against imports of certain hot-rolled lead and bismuth carbon steel products from Germany. Commerce issued its *Preliminary Determination* on September 17, 1992. On January 27, 1993, in its *Final Affirmative Determination*, Commerce determined "benefits which constitute subsidies within the meaning of the countervailing duty (CVD) law[5] are being provided to manufacturers, producers, or exporters in Germany of certain hot rolled lead and bismuth carbon steel products." *Final Affirmative Determination*, 58 Fed. Reg. at 6,233. The *Final Affirmative Determination* continued on to note "[b]ecause the debt forgiveness * * * was only provided to one company," it fell within 19 U.S.C. § 1677(5)(A)(ii) (1988) as "limited to a specific enterprise or industry or group of enterprises or industries" and was, as a result, countervailable. *Id.* at 6,234. Additionally, Commerce determined because the German governments' forgiveness of Saarstahl's debts was necessary to effect the sale or privatization of Saarstahl, the entire amount of debt-forgiveness directly benefitted Saarstahl's new parent, the then newly-formed DHS, and therefore was a countervailable subsidy to DHS. Commerce stated "[b]ecause the debt forgiveness was part of the deal negotiated to effect the merger, we consider the forgiveness to benefit the newly-formed company, not the predecessor to DHS. Therefore, pass through of subsidies received by the predecessor company is not at issue here." *Id.* at 6,236–37.

Commerce also determined the debt forgiveness by private banks was countervailable, because "it was required by the governments as part of a government-led debt reduction package for Saarstahl and because the two governments guaranteed the future liquidity of Saarstahl, thereby, implicitly assuring the private banks that the remaining portion of Saarstahl's outstanding loans would be repaid." *Id.* at 6,235. Following the ITC's affirmative injury determination, Commerce issued a countervailing duty order for the relevant products under investigation. *See Countervailing Duty Order: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 58 Fed. Reg. 15,325 (Dep't Comm. 1993).

C. *Privatization:*

In a subsequent countervailing duty investigation entitled *Final Affirmative Countervailing Duty Determination; Certain Steel Products From Germany*, 58 Fed. Reg. 37,315 (Dep't Comm. 1993) *("German Certain Steel")*, based upon a review of the identical facts presented in the *Final Affirmative Determination* in *Certain Hot Rolled Lead*, Commerce reconsidered the effect of privatization on the benefits conferred

---

[5] The statute provides a countervailable domestic subsidy is a benefit "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise." 19 U.S.C. § 1677(5)(A)(ii) (1988).

on Saarstahl by private sources and modified the position it took in the *Certain Hot Rolled Lead Final Affirmative Determination*. In the new investigations, Commerce determined "the debt forgiveness * * * provided benefits to Saarstahl which were then passed through to DHS." *German Certain Steel*, 58 Fed. Reg. at 37,320. Commerce determined the benefit from the forgiveness of Saarstahl's debt was "allocable to DHS because the restructuring would not have occurred but for the government's intervention." *General Issues Appendix to Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37,225, 37,272 (Dep't Comm. 1993) ("*General Issues Appendix*"). Commerce further determined although the privatization of a public company through an arm's length sale did not automatically extinguish the countervailability of the prior subsidies, the price paid for the company could constitute a partial repayment of the prior subsidies and the portion of the subsidy deemed to be repaid was not countervailable. *See German Certain Steel*, 58 Fed. Reg. at 37, 320. Commerce explained,

> a private party purchasing all or part of a government-owned company (*e.g.* a productive unit) can repay prior subsidies on behalf of the company as part or all of the sales price. Therefore, to the extent that a portion of the price paid for a privatized company can reasonably be attributed to prior subsidies, that portion of those subsidies will be extinguished.

General Issues Appendix, 58 Fed. Reg. at 37,262–63.[6]

In light of its determination in *German Certain Steel*, Commerce concluded its prior *Final Affirmative Determination* in *Certain Hot Rolled Lead* was not supported by substantial evidence on the record and was not otherwise in accordance with law. As a result of its decision in *German Certain Steel*, Commerce requested and was granted a remand on September 21, 1993, to reconsider the *Final Affirmative Determination* in *Certain Hot Rolled Lead* because the new privatization methodology developed in *German Certain Steel* markedly differed from the methodology utilized by Commerce in the *Certain Hot Rolled Lead Final Affirmative Determination*. On remand, Commerce explained "[w]e have reconsidered our original determination regarding the effects of privatization on subsidies previously received by Saarstahl and have concluded that it is not supported by substantial evidence and otherwise in accordance with law." *Remand Determination* at 2. Commerce re-analyzed the privatization of Saarstahl and applied the methodology articulated in the privatization section of the *General Issues Appendix*. Commerce determined the forgiveness of Saarstahl SVK's debt amounted to a grant, the benefit of which passed to Saarstahl AG after privatization. Commerce also determined part of the Saarstahl sales price contributed

---

[6] Commerce's new approach is explained in the sections entitled "Privatization" and "Restructuring" contained in the *General Issues Appendix*. The *General Issues Appendix* addresses issues that were common to several countervailing duty investigations of steel products from various countries. The section of the Appendix addressing the privatization methodology is found at 58 Fed. Reg. at 37,259–65. The section of the Appendix addressing restructuring is found at 58 Fed. Reg. at 37,265–73.

to repaying the prior subsidies to the same extent that the subsidies comprised Saarstahl SVK's net worth and adjusted the countervailing duty margins accordingly. This finding lowered the countervailing duty from 17.28 percent to 16.85 percent.

As a result of the actions filed appealing Commerce's *Final Affirmative Determination* as modified by Commerce's *Remand Determination*, in *Saarstahl AG v. United States*, 858 F. Supp. 187 (CIT 1994), the Court of International Trade ("CIT") upheld Commerce's finding Saarstahl was privatized as based on substantial evidence and as otherwise in accordance with law. This Court also held, however, Commerce's privatization methodology, to the extent it stated previously bestowed subsidies are passed through to a successor company sold in an arm's-length transaction, was unlawful.

In *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996), the CAFC reversed and remanded this Court's decision in *Saarstahl, AG v. United States*, 858 F. Supp. 187 (CIT 1994). *See also Inland Steel Bar Co. v. United States*, 86 F.3d 1174 (Fed. Cir. 1996), *rev'g and remanding*, 858 F. Supp. 179 (CIT 1994). The Federal Circuit held this Court "erred in holding that *as a matter of law* a subsidy cannot be passed through during an arm's length transaction." *Saarstahl*, 78 F.3d at 1544 (emphasis in original). The Federal Circuit remanded the case to this Court, concluding this Court did not address all of the parties' arguments, including Commerce's request for a remand to review the agency's allocation of Saarstahl's purchase price to repayment of prior subsidies and to assess Saarstahl's creditworthiness in 1989. As a result, this Court subsequently remanded the action to Commerce in *Saarstahl AG v. United States*, 933 F. Supp. 1106 (CIT 1996) ("*Saarstahl I*").

Following the CAFC's decision in *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996), this Court ruled on the Department's privatization remand in *British Steel plc v. United States*, 924 F. Supp. 139 (CIT 1996) (CIT 1996) ("*British Steel II*"), *appeals docketed*, Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996). While affirming the Department's determinations regarding several countries, this Court stayed its consideration of the privatization remand as it pertained *German Certain Steel*. In an order dated April 30, 1996, this Court vacated that stay, instructing the Department to address and make findings regarding seven additional issues in light of the Court's decisions in *British Steel plc. v. United* States, 879 F. Supp. 1254 (CIT 1995) ("*British Steel I*"), *appeals docketed*, Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996) and *British Steel II*. Commerce did so in *Final Results of Redetermination Pursuant to Court Remand On Certain Factual Issues Regarding the Privatization in Germany Saarstahl AG v. United States* (August 19, 1996) ("*Final Results*").

In *Final Results*, Commerce referred to this Court's order of April 30, 1996 instructing Commerce to address and make findings regarding seven issues concerning the privatization at issue in light of the Court's decisions in the *British Steel* cases. Commerce followed the Court's or-

der and made findings in response to the seven issues. Commerce determined "the Department may properly countervail the exports of Saarstahl AG * * * in the full amount of the subsidies received prior to privatization which are attributable to Saarstahl." *Final Results* at 4 (footnote omitted).

In addressing the question of whether the pre-privatization entity had received subsidies which survived privatization, Commerce held while the identity of the shareholders with ownership interests differed after privatization, the corporate identity of Saarstahl remained unaltered. Commerce stated it was, therefore, the same entity that had formerly received subsidies. *See Final Results* at 10–11. The Department determined

> DHS/Dillinger [post privatization DHS] does not cease to be for all intents and purposes the same entity which received the subsidies simply because most of SVK/Dillinger's [pre-privatization DHS] assets were transferred to the newly-created subsidiary [Saarstahl AG] two weeks after privatization. The privatized DHS/Dillinger continued to benefit from those assets and to be responsible for the remaining liabilities after the transfer to [Saarstahl AG] just as it had after the combination with Dillinger but prior to the creation of [Saarstahl AG].

Final Results at 11. Thus, Commerce concluded, DHS/ Dillinger—the post-privatization entity—remained for all intents and purposes the same entity as SVK/Dillinger—the pre-privatization entity which received the subsidy. *Id.* at 12.

On September 3, 1996, this Court found those aspects of the *Final Results* pertaining to the issue of privatization were supported by substantial evidence on the record and otherwise in accordance with law and entered final judgment with respect to the issue of privatization pursuant to U.S. CIT R. 54(b). *See Saarstahl AG v. United States*, 939 F. Supp. 898 (CIT 1996) *("Saarstahl II"), appeal docketed*, No. 97–1122 (Fed. Cir. Nov. 25, 1996), *consolidated with* No. 97–1135 (Fed. Cir. Dec. 5, 1996). In *Saarstahl II*, the Court also denied Saarstahl's Motion for Oral Argument with respect to privatization, but indicated the non-privatization issues would be decided in a future, separate opinion and oral argument might be appropriate to assist the Court in resolving those non-privatization issues. *See Saarstahl II*, 939 F. Supp. at 901 n.3. It is these non-privatization issues which the Court addresses in this opinion.

D. *Allocation:*

In *Saarstahl AG v. United States*, 949 F. Supp. 863 (CIT 1996) *("Saarstahl III"),* Saarstahl moved for leave to amend its Complaint to include a Count VII challenging Commerce's use of the fifteen-year average useful life found in the Internal Revenue Service ("IRS") tax tables to allocate the benefit of nonrecurring subsidies as unsupported by substantial evidence on the record and as not otherwise in accordance with law. Saarstahl argued use of the new allocation methodology

was required by this Court's recent decisions in *British Steel plc. v. United States*, 929 F. Supp. 426 (CIT 1996) (*"British Steel III"*) and *British Steel I*, where the Court struck down Commerce's use of the fifteen-year average useful life from the IRS tax tables to allocate the benefit of nonrecurring subsidies and affirmed a methodology which allocated nonrecurring subsidies based upon actual average useful life of the physical assets for each respondent. Saarstahl also requested oral argument on the issue of allocation. In *Saarstahl III*, this Court denied Saarstahl's Motion for Leave to Amend its Complaint and for Oral Argument on the issue of allocation. This Court held allowing Saarstahl to raise the allocation issue would unfairly prejudice both defendant-intervenor Inland Steel Bar Company as well as the Commerce Department. As a result, this issue regarding Commerce's use of the fifteen-year average useful life from the IRS tax tables to allocate the benefit of nonrecurring subsidies is not before the Court in this decision.

CONTENTIONS OF THE PARTIES

E. *Saarstahl AG v. United States & Inland Steel Bar Company:*

Plaintiff raises three challenges to Commerce's *Final Affirmative* and *Remand Determinations*. First, Saarstahl asserts Commerce "erroneously found that the abandonment of contingent repayment obligations at the time Saarstahl was privatized constituted a new countervailable event in 1989, in the form of the forgiveness of long-term, interest-free, contingent-liability loans." (Pl.'s Mem. in Supp. of Mot. for J. on the Agency R. (Pl.'s Mem.") at 11.) Second, Saarstahl argues Commerce's determination that the value of the abandoned RZVs in 1989 was their "face value," that is, the value of the assistance given in the late 1970s and 1980s, is contrary to record evidence. Third, Saarstahl argues the ITA's determination that the private banks' debt forgiveness provided a countervailable subsidy is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

Defendant argues Commerce properly determined the German governments' forgiveness of Saarstahl's contingent repayment obligations constituted a countervailable subsidy in 1989. Defendant additionally argues Commerce's determination the governments' forgiveness of the RZVs constituted a countervailable benefit in an amount equal to the face value of the RZVs is reasonable and is supported by substantial evidence on the record. Defendant also argues the forgiveness of Saarstahl's debt held by private banks constitutes a countervailable subsidy.

Inland argues Saarstahl did not successfully demonstrate the RZVs were not repayment obligations which were forgiven, and therefore, Commerce's determination should be sustained. Inland additionally asserts Commerce's valuation of the RZVs was reasonable and supported by record evidence. Finally, Inland contends Commerce's findings with regard to the private banks' forgiveness of Saarstahl's debt should not be disturbed.

B. *Inland Steel Bar Company v. United States:*

Defendant-Intervenor Inland Steel Bar Company also moves for Judgment on the Agency Record, arguing the *Final Affirmative* and *Remand Determinations* of Commerce are unlawful, void and of no effect. Inland argues Saarstahl has "ignored basic principles of administrative law and procedure in an attempt to reargue its case *de novo*." (Opp'n to Pl.'s Mot. for J. on Agency R. ("Def.-Int.'s Opp'n") at 2.) Defendant-Intervenor further argues the Department's errors "resulted in a determination that is arbitrary, capricious and an abuse of discretion." (Def.-Int.'s Mot. for J. on Agency R. at 2.)

First, Inland argues Commerce erred when it "treated subsidies received only by Saarstahl as benefitting products produced by DHS's other subsidiary, Dillinger." (Br. in Supp. of Def.-Int.'s Mot. for J. on Agency R. ("Def.-Int.'s Br.") at 2.) Inland argues Commerce should allocate subsidies granted to Saarstahl only over the products made by Saarstahl, excluding merchandise produced by Dillinger.

Second, Inland maintains Commerce erred when, "[w]ithout explanation, the Final Determination apparently found Saarstahl as creditworthy in 1989, in spite of finding the company *un*creditworthy in the Preliminary Determination." *(Id.)* Inland concludes, "[b]ecause of [these] errors[], this Court should remand the determination to Commerce to correct [these errors]." *(Id.)* Defendant requests a remand so Commerce can reconsider the discount rate in light of the findings in Commerce's *Remand Determination*. Saarstahl, however, objects to a remand for Commerce to include a risk premium in the discount rate.

STANDARD OF REVIEW

The appropriate standard for the Court's review of a final determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is that which "'a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951) (citation omitted), *quoted in Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed Cir. (T) 44, 51, 750 F.2d 927, 933 (1984).

The Court must accord substantial weight to the agency's interpretation of the statute it administers. *See American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). While Commerce has discretion in choosing one interpretation over another, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986), *cited in Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) ("[T]his Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute."), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

The Court is not to substitute its own determination for the agency's but rather is to determine whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. *See, e.g., Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1966) (noting "the possibility of drawing two inconsistent conclusions from the evidence does not permit an administrative agency's finding from being supported by substantial evidence"); *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct at 465, 95 L.Ed. at 467–68 (1951) (the reviewing court may not "even as to matters not requiring expertise * * * displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

DISCUSSION

In accordance with a February 18, 1994 scheduling order, and after extensive consultation with the parties and upon their consent, the parties were directed to brief five general issues regarding determinations by the International Trade Administration ("ITA") addressing steel products from various countries.[7] The order also set forth a schedule for the parties to submit individual briefs on a country-specific basis addressing other issues raised by the ITA's determinations. In prior opinions, this Court has disposed of all challenges to the five general issues and they are presently on appeal before the Court of Appeals for the Federal Circuit. *See British Steel plc v. United States*, 936 F. Supp. 1053 (CIT 1996) ("*British Steel IV*"); *British Steel III*, 929 F. Supp. 426; *British Steel II*, 924 F. Supp. 139; *British Steel I*, 879 F. Supp. 1254 (collectively the "*British Steel* cases" or the "general issues opinions"). What remains before this Court are the parties' country-specific challenges to Commerce's steel determinations. As a result, this opinion will not address the challenges raised in the parties' papers regarding the propriety of Commerce's privatization methodology nor its choice of the fifteen-year allocation period to determine the benefit from each of the nonrecurring countervailable subsidies because those issues have been decided conclusively in the general issues opinions. This opinion will address only country-specific issues involving Saarstahl which remain undecided following the general issues decisions. While the Court believes this opinion is in no way inconsistent with its prior opinions addressing the general issues, to the extent this opinion is seen to conflict in any way with the Court's general issues decisions, this Court's findings in the general issues opinions will prevail.

---

[7] The five general issues were: (1) Commerce's use of a 15-year allocation period to determine the benefit from each of the nonrecurring countervailable grants; (2) Commerce's use of a grant methodology to countervail equity infusions into an uncreditworthy company whose shares are not publically traded; (3) Commerce's treatment of privatization and restructuring regarding previously received subsidies, including Commerce's use of a repayment methodology; (4) Commerce's determination of the appropriate sales denominator to be used in subsidy calculations when a respondent's total sales include not only sales of domestically produced merchandise, but also sales of merchandise produced in one or more foreign countries; and (5) Commerce's treatment of disproportionality for the purposes of evaluating the specificity of a potentially countervailable program.

A. *Saarstahl AG v. United States & Inland Steel Bar Company:*

This Court notes the three arguments raised by plaintiff as challenges to the *Final Affirmative* and *Remand Determinations*. Plaintiff argues: (1) the contingent repayment obligations at issue were not loans, (2) Commerce erred in calculating the value of the contingent repayment obligations, and (3) Commerce's determination that the private banks' debt forgiveness was a countervailable subsidy is not supported by substantial evidence on the record and is otherwise not in accordance with law. While the issues raised by plaintiff's challenges would be properly before the Court in this opinion because they do not relate to general issues of privatization or allocation, the Court notes these three issues have been addressed conclusively in *British Steel IV*.[8] In *British Steel IV*, this Court indicated its opinion would "result in the final resolution of all issues presented." *British Steel IV*, 936 F. Supp. at 1057. As a result, the Court supports the determinations made regarding these country-specific issues in *British Steel IV* and will not reexamine those issues again in this opinion.

B. *Inland Steel Bar Company v. United States:*

This Court additionally finds Inland's argument regarding the allocation of subsidies over total sales of DHS[9] was decided conclusively in *British Steel IV* and therefore will not be reexamined in this opinion. *See British Steel IV*, 936 F. Supp. at 1067–68 (noting "Commerce's attribution of the subsidies received by DHS to the production of Dillinger as a subsidiary of DHS is supported by substantial evidence and is otherwise in accordance with law").[10]

Inland's additional argument that Commerce should reconsider the discount rate in light of Saarstahl's creditworthiness is before the Court in this opinion. Commerce treated the debt forgiveness by the governments and the private banks as grants and calculated the benefit from the forgiveness in accordance with its grant methodology, which requires the selection of a discount rate to allocate the benefits over time. *See Proposed Regulations*, 54 Fed. Reg. at 23,384 (to be codified at 19

---

[8] In *British Steel IV*, Dillinger set forth six arguments, three of which were identical to plaintiff's challenges in this opinion and one of which was identical to an argument presented by Inland in this opinion. Dillinger argued: (1) Commerce improperly allocated the subsidies at issue over total DHS sales, including Dillinger's sales of flat-rolled steel plate products; (2) Commerce's finding the abandonment of contingent repayment obligations (RZVs) constituted forgiveness of long-term, contingent-liability, interest-free loans was not supported by evidence on the record; (3) assuming the 1989 abandonment of the RZVs was a countervailable event, Commerce erred in determining that the value of the abandoned RZVs in 1989 was their "face" value; and (4) Commerce erred in finding forgiveness of principal and interest by private banks constituted a countervailable subsidy.

The Court rejected Dillinger's arguments and sustained Commerce, holding Commerce's allocation of the subsidies at issue over total DHS sales, including Dillinger's sales of flat-rolled steel plate products was supported by substantial evidence on the record and was otherwise in accordance with law. The Court also rejected Dillinger's arguments regarding the countervailability of the abandoned RZVs, as well as Dillinger's arguments about Commerce's determination of the RZVs' value. Finally, the Court sustained Commerce's finding the private banks' debt forgiveness was a countervailable subsidy as supported by substantial evidence on the record and as otherwise in accordance with law.

[9] The Court notes the specific issue of the allocation of subsidies over the total sales of DHS is distinct from the general issue of Commerce's use of a 15-year allocation period to determine the benefit from each of the nonrecurring countervailable grants.

[10] In Saarstahl's original brief, Saarstahl also argued Commerce incorrectly determined to allocate subsidy benefits found to Saarstahl over the total sales of both DHS subsidiaries, Saarstahl and Dillinger, when it should have "tied" those benefits entirely to Saarstahl's long products production. (*See* Pl.'s Mem. at 13–26). Saarstahl withdrew this argument in its Reply Brief. *See* Saarstahl AG's Reply Br. at 2 (stating "Saarstahl hereby withdraws its argument that ITA's allocation of subsidies over the sales of both Saarstahl and its related companies was unlawful.")

C.F.R. § 355.49(b)(1)(ii)).[11] When the recipient of a grant is found to be uncreditworthy, Commerce adds a "risk premium" to the discount rate to reflect the increased costs such a company faces and the extra risk of lending to an uncreditworthy company. While the *Proposed Regulations* provide for Commerce's utilization of uncreditworthy benchmark rates and do not specifically provide for uncreditworthy discount rates, Commerce has consistently followed its practice of using uncreditworthy discount rates both before and after issuance of the *Proposed Regulations*. *See e.g.*, *Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From France*, 58 Fed. Reg. 6,221, 6,224 (Dep't Comm. 1993) (final determ.) (benchmark interest rate used as discount rate); *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Spain*, 58 Fed. Reg. 37,374, 37,384–85 (Dep't Comm. 1993) (final determ.) (same); *Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, From Canada*, 54 Fed. Reg. 31,991, 31,994 (Dep't Comm. 1989) (final determ.) (same); *Certain Carbon Steel Products From Brazil; Final Results of Countervailing Duty Administrative Review*, 52 Fed. Reg. 829, 831 (Dep't Comm. 1987) (final results of admin. review) (same).

Inland argues Commerce erred when it omitted an uncreditworthiness risk premium from its calculation of the discount rate after finding Saarstahl uncreditworthy in the *Preliminary Determination*[12] and reaching no conclusion about the company's creditworthiness in the *Final Affirmative Determination*. Inland argues Commerce's failure to add a risk premium to the discount rate implies Saarstahl was creditworthy in 1989, "a finding completely without support on the administrative record." (Def.-Int.'s Br. at 21–22.)

Inland argues Commerce's failure to add an uncreditworthiness risk premium to the discount rate "is reversible error because Commerce im-

---

[11] The proposed regulation provides

§ 355.49 Allocation of countervailable benefits over time.

* * * * * * *

(b)(1) *Process for allocating grants and certain equity infusions over time.* In allocating over time the benefit from a nonrecurring grant or an equity infusion described in § 355.44(e)(1)(i), the Secretary will use the following three-step process:

(i) Determine the amount of the countervailable benefit pursuant to § 355.44;
(ii) Assign a discount rate; and
(iii) Construct a benefit stream.

(2) For purposes of paragraph (b)(1)(ii) of this section, the Secretary will use as a discount rate the following, in order of preference:

(i) The cost of long-term, fixed-rate debt of the firm in question, excluding loans found to confer a countervailable subsidy;
(ii) The average cost of long-term, fixed-rate debt in the country in question; or
(iii) A rate which the Secretary considers to be most appropriate.

Proposed Regulations, 54 Fed. Reg. at 23,384 (to be codified at 19 C.F.R. § 355.49).

[12] The *Preliminary Determination* included a finding Saarstahl was uncreditworthy when the government forgave its debt in 1989. In the *Preliminary Determination*, Commerce based its discount rate on the highest long-term interest rate applicable to firms in Germany and added to that figure an amount equal to 12 percent of the country's prime rate. *Preliminary Determination*, 57 Fed. Reg. at 42,972. *See Proposed Regulations*, 54 Fed. Reg. at 23,381 (to be codified at 19 C.F.R. § 355.44(b)(6)(iv) ("[I]f the Secretary deems a firm to be uncreditworthy * * *, the Secretary will calculate the benchmark interest rate for a long-term government loan by taking the sum of 12 percent of the prime rate in the country in question and: [other relevant actors] * * *.")). Commerce noted that according to the response of the GOG, there were no official statistics on long-term interest rates or interest rates comparable to the U.S. prime rate in Germany and "[t]herefore, [Commerce] reviewed the interest rates published in the International Monetary Fund's International Financial Statistic and used the average annual interest rate reported in that publication for 1989, the year in which Saarstahl's debt was forgiven." *Preliminary Determination* at 42,372. Commerce calculated a discount rate of 11.13 percent.

plicitly reversed the Preliminary Determination's uncreditworthiness premium without explanation. This action violates the principle that Commerce must set forth 'grounds for [any] departure from prior norms * * * so that the reviewing court may understand the basis of the agency's action." *(Id.* at 12–13 (citation omitted).) Inland explains "[a] finding of uncreditworthiness can substantially increase the countervailing duty rate," *(id.* at 21), and concludes "Commerce had to add an uncreditworthiness premium to the discount rate because there is not *any* evidence on the administrative record to support a finding that Saarstahl was creditworthy." *(Id.* at 13.) As a result, Inland argues this Court should remand this issue to Commerce with instructions to find Saarstahl uncreditworthy in 1989 and to add an uncreditworthiness risk premium to the discount rate.

Defendant explains Commerce made a preliminary determination Saarstahl SVK was uncreditworthy in 1989, but did not finalize that determination and include a risk premium because DHS was deemed to be the direct beneficiary of the debt forgiveness in the *Final Affirmative Determination*. Defendant continues to note when the *Final Affirmative Determination* was modified on remand, however, Commerce concluded the debt forgiveness was a benefit to Saarstahl SVK that passed through to DHS. *See Remand Determination* at 6, 9. Defendant maintains since Commerce measures a subsidy at the time of receipt, "[i]f Saarstahl SVK, the initial recipient of the benefit from the debt forgiveness, was uncreditworthy in 1989, a risk premium should be included." (Def.'s Mem. at 58.) As a result, defendant requests this Court remand the determination so Commerce may reconsider the discount rate in light of the findings in Commerce's *Remand Determination*.

Saarstahl objects to a remand in order to include a risk premium. In addressing Commerce's change in characterizing the beneficiary of the debt forgiveness, Saarstahl argues Commerce "asserts a distinction without a difference" and "simply makes a false distinction between 'direct' benefits to DHS and benefits which 'subsequently passed through' to DHS. There was no time lag which would justify imposing a risk premium in this case." (Pl.'s Reply Br. at 23–24 (citation omitted).) Saarstahl additionally argues if the creditworthiness of the recipient is the test for whether a risk premium should be imposed, Commerce should examine the creditworthiness of DHS, "which was created under, and benefitted by, the same transaction in which the debt was forgiven." *(Id.* at 24.) If Commerce looked to DHS, Saarstahl maintains, there would be no basis for a risk premium because DHS was not determined to be uncreditworthy. As a result, Saarstahl argues, whether Saarstahl SVK was creditworthy at the time of the 1989 transaction is immaterial and the Court should deny Commerce's request for a remand on this issue.

This Court finds defendant's arguments advocating a remand on this issue are reasonable and grants defendant's request to remand this issue. Commerce will reconsider the issue of Saarstahl's creditworthiness and make a finding as to whether a risk premium should be included in the calculation of the discount rate. Commerce shall reconsider the dis-

count rate in light of Saarstahl's creditworthiness and recalculate the countervailing duties due, if any, as a result of the discount rate determination.

CONCLUSION

After carefully considering the arguments of all parties, this Court denies plaintiff's Motion for Judgment on the Agency Record, as well as plaintiff's Motion for Oral Argument. This Court denies in part and grants in part defendant-intervenor's Motion for Judgment on the Agency Record. This Court sustains Commerce's *Final Affirmative Determination* as modified by the *Remand Determination* with respect to issues not relating to privatization or allocation except with respect to the calculation of the discount rate in light of Saarstahl's creditworthiness. This Court remands this issue to Commerce for it to reconsider the discount rate in light of Saarstahl's creditworthiness.

(Slip Op. 97–68)

JOHN V. URBANO, PLAINTIFF *v.* UNITED STATES, U.S. DEPARTMENT OF TREASURY, SECRETARY OF TREASURY, GEORGE J. WEISE, COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, AND AUDREY ADAMS, PORT DIRECTOR OF CUSTOMS, FOR THE LOS ANGELES CUSTOMS DISTRICT, DEFENDANTS

Court No. 95–12–01721

Plaintiff moves for Judgment on the Agency Record pursuant to U.S. CIT R. 56.1, arguing he was unduly deprived of his license as a customs broker. Plaintiff asks this Court set aside the Secretary of the Treasury's decision revoking his license, asserting his revocation hearing was tainted in several respects and the five-year statute of limitations governing license revocations had run prior to the Government's commencement of formal revocation proceedings. Plaintiff also moves for Oral Argument on his Motion for Judgment on the Agency Record. Defendants oppose plaintiff's motions and request this Court deny them and dismiss this action.

Held: Plaintiff's Motion for Judgment on the Agency Record is denied. This Court finds the administrative law judge's recommendation that plaintiff's license be revoked and the Secretary of the Treasury's subsequent adoption of that recommendation is supported by substantial evidence on the record and is otherwise in accordance with law. Plaintiff's Motion for Oral Argument is denied. The parties' papers are clear and extensive and therefore oral argument on the issues raised is unnecessary. This case is dismissed.

(Dated May 30, 1997)

Politis & Politis (John N. Politis), Los Angeles, CA, counsel for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *(Mikki Graves Walser);* Commercial Litigation Branch, Civil Division, Department of Justice, *Stephanie J. Dick,* Deputy Associate Chief Counsel, Office of Associate Chief Counsel, United States Customs Service, of counsel, for defendants.

OPINION

CARMAN, *Chief Judge:* Before the Court is plaintiff John V. Urbano's ("plaintiff" or "Urbano") Motion for Judgment on the Agency Record

pursuant to U.S. CIT R. 56.1. Plaintiff argues he was wrongfully deprived of his license as a United States Customs broker which was revoked pursuant to a hearing in 1994. Plaintiff maintains the commencement of formal revocation proceedings was barred by the five-year statute of limitations contained in 19 U.S.C. § 1641(d)(2) (1988). Plaintiff additionally argues the revocation hearing was tainted. Plaintiff also moves for Oral Argument pursuant to U.S. CIT R.7(c) on his Motion for Judgment on the Agency Record

Defendants the United States, the U.S. Department of Treasury, the Secretary of the Treasury ("the Secretary"), George J. Weise, the Commissioner of Customs and Audrey Adams, the port director of Customs for the Los Angeles Customs District (collectively "defendants") oppose plaintiff's motion, arguing Customs properly instituted revocation proceedings within five years of the alleged violations. Defendants further argue the revocation hearing was conducted in accordance with the Administrative Procedure Act ("APA") and Customs regulations, and that the Administrative Law Judge's finding Customs presented substantial and overwhelming evidence to support the revocation of plaintiff's license was based upon credible evidence presented at the hearing. Defendants also oppose plaintiff's Motion for Oral Argument, arguing the issues in this case "have been thoroughly briefed by the parties and the factual materials necessary for this [C]ourt's determination are contained in the administrative record." (Defs.' Resp. to Pl.'s Mot. for Oral Arg. at 1.) As a result, defendants request this Court sustain the Secretary's decision adopting the ALJ's recommendation to revoke plaintiff's customs broker's license, deny plaintiff's motions and dismiss this action. This Court has jurisdiction pursuant to 28 U.S.C. §1581(g)(2), which gives the Court of International Trade ("CIT") exclusive jurisdiction over "any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit." 28 U.S.C. §1581(g)(2) (1988). For the reasons which follow, this Court denies plaintiff's Motion for Oral Argument and plaintiff's Motion for Judgment on the Agency Record.

BACKGROUND

Plaintiff John V. Urbano has engaged in the customs brokerage business since 1967. Plaintiff was issued individual broker's license number 6884 by the United States Customs Service ("Customs") on September 3, 1981. Plaintiff subsequently filed an application for and was granted permission by Customs to conduct business under the fictitious name "Royal International" on November 13, 1986. Plaintiff is also incorporated in the State of California as Royal International Customs Brokers, Incorporated.

On September 28, 1989, the Regulatory Audit Division of the United States Customs Service issued a report following its investigation of possible criminal violations relating to plaintiff's embezzlement of Customs duties. The audit report disclosed 583 violations by plaintiff between 1985 and 1989 and concluded plaintiff, through Royal International, had (1) misappropriated Customs duties received from import-

ers; (2) written checks to Customs on a bank account containing insufficient funds; and (3) failed to comply with various Customs Regulations pertaining to customs brokers. Admin. R. at 736.[1] The report recommended the district director revoke plaintiff's customs broker's license pursuant to 19 C.F.R. § 111.53(c),(f)[2] based on plaintiff's failure to comply with numerous regulations establishing procedures for record-keeping and conducting a business.[3] Admin. R. at 734–49, 1044–59, 1076–91.

After surrendering his customs broker's licence to Customs in 1990, plaintiff filed suit in this Court seeking the return of his license. This Court approved a Stipulated Judgment whereby the parties agreed and the Court ordered Customs to return to plaintiff his Customs broker's license to remain in effect until the outcome of the revocation proceedings. The judgment indicated Customs was free to institute revocation proceedings in the event it was deemed necessary. *See Urbano v. United States*, Court No. 91–03–00235 (CIT April 22, 1991). Customs returned plaintiff's license and he continued his employment with AFI (California), Inc. where his license supported the Los Angeles Customs District permit of his employer.

On March 9, 1993, the District Director of Customs in Los Angeles issued to plaintiff a "Notice of Preliminary Proceedings" pursuant to 19 C.F.R. § 111.59,[4] indicating Customs was considering instituting a formal proceeding to revoke plaintiff's customs broker's license and affording plaintiff an opportunity to avoid such proceedings by showing cause within thirty days why formal proceedings should not be instituted.

---

[1] In a memorandum opinion and order addressing a pre-revocation hearing motion, the ALJ indicated plaintiff was specifically charged with 36 instances of misappropriation of clients' funds in the total amount of $64,855; issuing seven checks to Customs in the total amount of $19,528 that were returned for insufficient funds; unauthorized use of Urbano's Customs license by a third person for the purpose of conducting Customs business; and failures to exercise reasonable supervision and control over Customs business.

United States Customs Service v. Urbano, No. LA–92–0042 RMG, Slip. Op. at 2 n.1 (Aug. 15, 1994) (memorandum opinion and order).

[2] 19 C.F.R. § 111.53 sets out grounds which justify Customs' seeking the suspension or revocation of a broker's license or permit, or the imposition of a monetary penalty in lieu thereof. *See* 19 C.F.R. § 111.53 (1994). The regulation allows the appropriate Customs official to revoke the license or permit of any broker if "[t]he broker has violated any provision of law enforced by Customs or the rules or regulations issued under any such provision." 19 C.F.R. § 111.53(c) (1994). The regulation also allows the appropriate Customs official to revoke the license or permit of any broker if "[t]he broker has, in the course of customs business, with intent to defraud, in any manner wilfully and knowingly deceived, misled or threatened any client or prospective client." 19 C.F.R. § 111.53(f) (1994).

[3] *See* 19 C.F.R. § 111.21 (1994) (requiring broker to maintain "records of account reflecting all his financial transactions as a broker"); 19 C.F.R. § 111.23(a)(2) (1994) (requiring records be kept by a broker "for at least 5 years after the date of entry"); 19 C.F.R. § 111.25 (1994) (requiring a broker to "maintain his records in such manner that they may readily be examined" and "made available for inspection, copying, reproduction or other official use"); 19 C.F.R. 111.28(a) (1994) (requiring broker to "exercise responsible supervision and control over the transaction of the Customs"); 19 C.F.R. 111.29(a) (1994) (requiring brokers to exercise due diligence "in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker"); 19 C.F.R. § 111.30(c), (e) (1994) (discussing the requirements for notification if the broker changes his business address, organization, name or location of business records); 19 C.F.R. 111.36(a) (1994) (forbidding brokers from "enter[ing] into any agreement with an unlicensed person to transact Customs business for others in such a manner that the fees or other benefits resulting from the services rendered for others inure to the benefit of the unlicensed person"); 19 C.F.R. § 111.37 (1994) (forbidding a broker from "permit[ting] his license, permit, or his name to be used by or for any unlicensed person, other than his own employees authorized to act for him"); 19 C.F.R. § 111.39(a) (1994) (forbidding brokers from "withhold[ing] information relative to any Customs business from a client who is entitled to the information"); 19 C.F.R. § 111.53(f) (discussing grounds for the suspension or revocation of a license or permit, *see supra* n.2).

[4] 19 C.F.R. § 111.59 addresses preliminary proceedings. Once the Notice of Preliminary Proceedings is served upon the broker, the regulation invites the broker to "show cause why the formal proceedings should not be instituted" and informs the broker that he "may make submissions and demonstrations." 19 C.F.R. § 111.59(b)(4), (5) (1994). The regulation also invites "any negotiation for settlement of the complaint," advises the broker of his right to counsel, requires the notice specify the place where the broker may respond in writing and advises the broker that the response must be received within thirty days of the date of the notice. 19 C.F.R. § 111.59(b)(6)–(9) (1994).

Admin. R. 1032–38. The notice was accompanied by a "Proposed Notice to Show Cause and Statement of Charges," which set forth the sections of the regulations plaintiff had allegedly violated. Plaintiff did not respond to the "Notice of Preliminary Proceedings" within the thirty-day period.

On July 5, 1994, the District Director issued a "Notice of Revocation Proceedings" with a "Notice to Show Cause and Statement of Charges," which indicated "[f]ormal proceedings looking to the revocation of Customshouse Broker's License No. 6884" were being instituted pursuant to 19 U.S.C. § 1641 (1988).[5] Admin. R. at 1064. The notice informed plaintiff he would be notified of the time and place of the hearing, he was entitled to file a verified answer, and he had both the right to be represented by counsel and the right to cross examine witnesses at the formal proceedings. *Id.* On July 6, 1994, the Assistant Regional Counsel for Customs in Los Angeles advised plaintiff by letter of the time and date of the revocation hearing on August 2, 1994 at 9:00 a.m before an Administrative Law Judge ("ALJ") of the Federal Communications Commission. *Id.* at 1146. Plaintiff did not file a verified answer.

Plaintiff objected to the hearing and by letters dated July 11, 1994, demanded the revocation proceedings be canceled immediately due to the expiration of the statute of limitations set forth in 19 U.S.C. § 1641(d)(4) (1988).[6] Customs responded its institution and litigation of the charges against plaintiff were not time barred. The ALJ rescheduled the hearing date from August 2, 1994 to August 30, 1994 to allow resolution of the statute of limitations issue. In a Memorandum Opinion and Order responding to cross-motions for a Ruling on the Statute of Limitations, the ALJ indicated the revocation proceedings were not barred by the statute of limitations and ordered the hearing to proceed on August 30, 1994. *See United States Customs Service v. Urbano,* No. LA–92–0042 RMG (Aug. 15, 1994) (memorandum opinion and order).

Following the ALJ's determination the formal revocation proceedings were not time barred, plaintiff filed a second motion requesting a continuance to depose two Customs officials and the Customs auditor who conducted the audit of Royal International's books and records. In an order dated August 22, 1994, the ALJ denied plaintiff's motion for a continuance on the ground plaintiff failed to show cause for postponing the hearing. The ALJ denied plaintiff's request to depose the two Customs

---

[5] The applicable statutory provision addressing procedures for the institution of formal license revocation proceedings mirrors 19 C.F.R. § 111.59 and states

> The appropriate customs officer may, for good and sufficient reason, serve notice in writing upon any customs broker to show cause why a license or permit issued under this section should not be revoked or suspended. The notice shall be in the form of a statement specifically setting forth the grounds of the complaint, and shall allow the customs broker 30 days to respond. If no response is filed, or the appropriate customs officer determines that the revocation or suspension is still warranted, he shall notify the customs broker in writing of a hearing to be held within 15 days, or at a later date if the broker requests an extension and shows good cause therefor, before an administrative law judge * * * who shall serve as the hearing officer.

19 U.S.C. § 1641(d)(2)(B) (1988).

[6] The statute provides

> no proceeding under this subsection * * * shall be commenced unless such proceeding is instituted by the appropriate service of written notice within 5 years from the date the alleged violation was committed; except that if the alleged violation consists of fraud, the 5-year period of limitation shall commence running from the time such alleged violation was discovered.

19 U.S.C. § 1641(d)(4) (1988).

officials because there was no evidence they acted outside the scope of their authority. Additionally, the ALJ noted the auditor no longer worked for Customs and therefore could not be ordered to appear. The order, however, did permit the plaintiff to depose the auditor at plaintiff's expense if the auditor voluntarily presented himself. *See United States Customs Service v. Urbano,* No. LA–92–0042 RMG (Aug. 22, 1994) (order denying plaintiff's request for a continuance).

The revocation hearing was held on August 30 and 31, 1994. On February 3, 1995, the ALJ issued his decision and order, recommending to the Secretary that plaintiff's license be revoked and stating

> [i]t has been held that where the government is aware that a broker has mishandled the affairs of importers, the government is obligated to investigate and, in appropriate circumstances, to revoke the broker's license. Accordingly, license revocation is recommended as the only appropriate sanction in this case to protect the importing community.

United States Customs Service v. Urbano, No. LA–92–0042 RMG, Slip Op. at 27 (Feb. 3, 1995) (decision and order) *("Revocation Recommendation".)* With regard to the issue of the five-year statute of limitations, the ALJ presiding at the hearing held

> [i]n *Fusco v. United States Treasury Department*, 695 F. Supp. 1189 (CIT 1988), the court noted that the Act does not distinguish between preliminary and formal proceedings. The court held that the revocation proceeding was instituted when the Proposed Notice To Show Cause And Notice Of Preliminary Proceeding was received by the respondent. *Id.* Thus, it is concluded that this proceeding was commenced within the applicable statute of limitations.

Admin. R. at 19.

In addressing plaintiff's due process claims, the ALJ held plaintiff was afforded due process and noted

> in view of the procedural status of the case on August 17, 1994, and the fact that Urbano had previously requested a continuance which was granted, and the further fact that there had been no request made to conduct discovery during that continuance, it was within the discretion of the Presiding Judge under the APA to limit the discovery.

Id. at 20. The ALJ continued on noting "[t]he discovery rulings of the Presiding Judge are consistent with affording due process in administrative proceedings." *Id.* Finally, the ALJ addressed the specific charges against plaintiff in this case, dismissing only the third charge that plaintiff wilfully and knowingly, with an intent to defraud, misled or threatened any client or prospective client under 19 C.F.R. § 111.53(f) (1994). The ALJ said "[plaintiff's] liability for all but the fraud charges is established as a matter of law by the evidence that was introduced by Customs counsel." *Id* at 25.

On October 25, 1995, the Secretary adopted the recommendations contained in the ALJ's Decision and Order, stating "I concur with the

ALJ's conclusion that [plaintiff] failed on repeated occasions to provide adequate supervision of his Customs brokerage business * * *. I hereby adopt the ALJ's findings of fact and recommended decision to revoke customshouse broker's license no. 6884 issued to [plaintiff]." Admin. R. at 1402.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

Plaintiff first argues the formal revocation proceedings were barred by the statute of limitations contained in 19 U.S.C. § 1641(d)(4) (1988), which requires Customs to initiate formal license revocations proceedings within five years from the date the alleged violation was committed.

Additionally, plaintiff argues the revocation hearing was tainted in four respects. First, plaintiff argues he was denied his due process right to engage in active discovery prior to the hearing and to depose all of his accusers. Second, plaintiff asserts he was denied access to documents relied on by the Customs auditor in preparing the audit report. Third, plaintiff maintains the government never considered and analyzed the business records of plaintiff's business which, plaintiff argues, provided exculpatory evidence. Finally, plaintiff argues the ALJ abused his discretion by not providing sufficient time to prepare for the revocation hearing and by refusing plaintiff access to the working papers of the Customs auditor "again in violation of plaintiff's Constitutional rights." (Pl.'s Mem. of Points and Auth. in Supp. of Mot. for J. Upon Agency R. ("Pl.'s Mem.") at 2.)

B. *Defendants:*

In response to plaintiff's allegation the formal revocation proceedings were barred by the statute of limitations, defendants argue the proceedings were instituted by Customs within the time frame provided by 19 U.S.C. § 1641(d)(4) (1988). Defendants explain on March 9, 1993, plaintiff was served by Customs with a "Notice of Preliminary Proceedings" and a "Proposed Notice to Show Cause And Statement of Charges," which informed him of the impending institution of formal proceedings to revoke his customs broker's license pursuant to 19 U.S.C. § 1641 and of his right to respond within thirty days of receipt of the notice. Defendants contend these notices constituted the written notice required by 19 U.S.C. § 1641(d)(4) and were provided within the five-year limit. Defendants conclude "[t]herefore, the finding by the ALJ that the proceedings instituted by Customs were not time barred was correct." (Defs.' Mem. in Supp. of Defs.' Resp. in Opp'n to Pl.'s Mot. for J. on Admin. R. ("Defs.' Mem.") at 10.)

Defendants next argue plaintiff was not deprived of his constitutional due process right when his request to engage in discovery on the eve of the revocation hearing was denied. Defendants explain under 19 C.F.R. § 111.67(c), the ALJ has discretion to permit or deny deposition discovery, and in this case, found such discovery should have been sought earlier in the proceedings in order to avoid disrupting the scheduled hearing date. Defendants maintain plaintiff failed to request a continuance in

order to depose the Customs auditor until shortly before the second hearing date, and had not requested a subpoena or shown any likelihood that evidence in the auditor's papers might contradict the business records to be introduced at the hearing. Defendants conclude plaintiff was not deprived of due process because the ALJ authorized the deposition of the auditor if the auditor, who was no longer employed by Customs, voluntarily made himself available to plaintiff before the hearing.

Defendants also argue plaintiff's claim he was deprived of due process when the ALJ did not take into account his "allegedly incapacitating illness during the first six months of 1988" is "without merit" and "simply not accurate" because paragraphs 41 and 42 of the ALJ's Decision and Order specifically refer to plaintiff's illness as a mitigating factor. (Defs.' Mem. at 11.) Defendants note the ALJ concluded plaintiff's illness did not excuse him from his responsibility to supervise adequately his brokerage business.

Finally, defendants disagree with plaintiff's claim the Customs auditor's testimony was tainted and should have been given no weight by the ALJ because the auion was not based solely upon either the auditor's report or the auditor's hearing testimony, but upon the testimony of at least thirteen witnesses, including the plaintiff's testimony. Defendants conclude plaintiff's admissions regarding his conduct "demonstrated gross dereliction of his responsibilities as a licensed Customs broker prior to and throughout the 1988 calendar year which support several violations of the customs regulations." *(Id.* at 11.)

Standard of Review

In reviewing the Secretary's decision to revoke plaintiff's customs broker's license, the Court shall set aside agency actions, findings, and conclusions that are unsupported by substantial evidence on the record, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. §§ 706(2)(A), 706(2)(E) (1988); *Barnhart v. U.S. Treasury Department*, 9 CIT 287, 290–91, 613 F. Supp. 370, 373–74 (1985). The agency's findings as to the facts are conclusive if supported by substantial evidence. *See* 19 U.S.C. § 1641(e)(3) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed.Cir. (T) 77, 810 F.2d 1137 (1987). The Court "may not substitute its judgment for that of the administrative agency", and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence." *Barnhart,* 9 CIT at 290, 613 F. Supp. at 373 (citations omitted). In reviewing the Secretary's findings as to legal issues, the Court will review whether the Secretary's decision to revoke plaintiff's license constitutes an abuse of discretion. "After satisfying itself that the agency has acted within its statutory authority and the action was * * * supported by substantial evidence, the Court must inquire whether the rationale is both discernable and defensible. In so doing, the Court * * *

need only assure itself the [Secretary's] decision was rational and based on consideration of relevant factors." *Barnhart*, 9 CIT at 291, 613 F. Supp. at 374 (citation omitted). *See Transfer Corp. v. Dickson, et al.*, 405 F. Supp. 506, 514 (CIT 1975) (citation omitted) (providing "[w]hen the penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency".); *Fusco v. United States Treasury Dept.*, 12 CIT 835, 840, 695 F Supp. 1189, 1194 (1988) (quotations and citations omitted) (noting "[a]n agency's choice of sanction is not to be overturned unless the reviewing court determines it is unwarranted in law * * * or without justification in fact").

DISCUSSION

I. *Statute of Limitations:*

Plaintiff argues the formal revocation proceedings were barred by the five-year statute of limitations provided for in 19 U.S.C. § 1641(d)(4) and, therefore, the Secretary's decision to revoke his customs broker's license should be overturned. The statute of limitations applicable in Customs broker revocation proceedings provides the Secretary may "revoke or suspend a license or permit of any customs broker" as long as the "proceeding is instituted by the appropriate service of written notice within 5 years from the date the alleged violation was committed." 19 U.S.C. § 1641(d)(1),(4) (1988).[7] In setting out the procedures for instituting disciplinary proceedings, the statute states

> The appropriate customs officer may, for good and sufficient reason, serve notice in writing upon any customs broker to show cause why a license or permit issued under this section should not be revoked or suspended. The notice shall be in the form of a statement specifically setting forth the grounds of the complaint, and shall allow the customs broker 30 days to respond. If no response is filed, or the appropriate customs officer determines that the revocation or suspension is still warranted, he shall notify the customs broker in writing of a hearing to be held within 15 days, or at a later date if the broker requests an extension and shows good cause therefor, before an administrative law judge appointed pursuant to section 3105 of title 5 who shall serve as the hearing officer.

19 U.S.C. § 1641(d)(2)(B) (1988).

In ruling on the statute of limitations issue, the ALJ noted plaintiff failed to file a response after he received a preliminary notice of the proposed charges on March 9, 1993. The ALJ also noted when the revocation hearing was rescheduled at plaintiff's request from August 2, 1994 to August 30, 1994, plaintiff could have used the additional time to file an answer and "cannot now be heard to assert that he is prejudiced by the notice procedure that was utilized by Customs in the institution of this proceeding." *United States Customs Service v. Urbano*, No. LA–92–0042 RMG, Slip Op. at 4 (Aug. 15, 1994) (memorandum opinion

[7] *See supra*, n.6.

and order). The ALJ noted this Court held in *Fusco v. United States Treasury Dept.*, 12 CIT 835, 695 F. Supp. 1189 (1988) that revocation proceedings were instituted when the "Proposed Notice to Show Cause and Notice of Preliminary Proceedings" were received by the respondent. The ALJ held for purposes of determining whether the statute of limitations had run on the charges against plaintiff, the statute did not distinguish between the initiation of preliminary and formal revocation proceedings for statute of limitations purposes. As a result the revocation proceeding was found initiated on March 9, 1993. The ALJ stated "[t]he statute and the regulations are clear under *Fusco* * * * that the institution of the informal proceeding on March 9, 1993, tolled the running of the statute of limitations. Therefore, the formal APA hearing that Customs initiated on July 5, 1994, while the statute of limitations was tolled, is not barred by the passage of time under 19 U.S.C.A. § 1641(d)(4)." *Id.* at 6.

Plaintiff, however, maintains his argument the statute of limitations on proceedings to revoke a Customs broker's license required Customs to initiate formal license revocation proceedings within five years from the date the alleged violation was committed, and that Customs failed to do so. Plaintiff explains after this Court's approval of the Stipulated Judgment in 1991, "Customs took *no* administrative action until March 9, 1993, when it issued a Notice of Preliminary Proceedings and a *Proposed* Notice To Show Cause and Statement of Charges," giving plaintiff preliminary notice of Customs' "intention" to institute formal proceedings to revoke his customs broker license. (Pl.'s Mem. at 2–3.) Next, plaintiff contends "Customs waited an additional nine (9) months and then instituted the formal proceedings for revocation of Mr. Urbano's customs broker's license." *(Id.* at 3.) Plaintiff concludes "[s]imply stated, these proceedings are time barred." *(Id.)*

Plaintiff argues the statute of limitations began running in December 1987 when Customs had actual knowledge of plaintiff's financial problems. Plaintiff contends the "preliminary proceedings of March 9, 1993, did not toll the running of the statute of limitations." *(Id.)* Plaintiff explains rather "[t]he notification of March 9, 1993, was entitled 'Preliminary' and was just that: a precursor of revocation proceedings * * *. This preliminary procedure is a non-mandatory, alternative dispute resolution procedure designed to avoid an unnecessary statutory proceeding." *(Id.* at 4.) Therefore, plaintiff argues, the Customs formal proceedings "are the only proceedings which toll the running of the statute of limitations, but, without dispute, they were initiated six years after the statute of limitations commenced and over one year after it expired." *(Id.)*

Plaintiff acknowledges *Fusco,* which was cited by the ALJ for the proposition that the Notice of Preliminary Proceedings tolled the running of the statute of limitations, but argues "that case has no relevance to the case at bar." *(Id.* at 4.) Plaintiff maintains the proceedings required to toll the statute of limitations under 19 U.S.C. § 1641(d)(4) are limited to "proceedings under this subsection." Plaintiff argues, as a re-

sult, only the formal proceedings discussed in the statute toll the statute of limitations. In this case, "[t]he government delayed the commencement of the formal proceedings beyond the deadline [of] June 1, 1993." *(Id.* at 5.) Plaintiff concludes, therefore, "this case should be dismissed." *(Id.)*

Finally, plaintiff argues "[t]here is no statutory authority to unilaterally and indefinitely extend the statute of limitations as Customs asks this Court to do." *(Id.)* Under Customs' reasoning, plaintiff argues, "by merely initiating preliminary proceedings to toll the statute, the Customs Service can extend the statute of limitations until it is good and ready to proceed with the statutory proceedings however long that may be. That is contrary to the principles behind statutes of limitations." *(Id.* at 6.) Plaintiff concludes in this case, the preliminary proceedings are not set forth in the statute, are not mandatory, and, therefore, "[u]nder these circumstances, the only legal proceeding which tolls the statute of limitations is the mandatory one set forth in the statute." *(Id.* at 7.)

Defendants respond to plaintiff's claims by arguing Customs, in accordance with 19 U.S.C. § 1641(d)(2)(B), served on plaintiff a "Notice of Preliminary Proceedings" and a "Proposed Notice to Show Cause and Statement of Charges" which "was in the form of a statement specifically setting forth the grounds of the complaint *and* provided [plaintiff] thirty days within which to respond to the charges." (Defs.' Mem. at 15.) In addition, defendants maintain "the notice informed [plaintiff] of each and every charge against him" and "of the procedures which would follow, including delivery of a final notice to show cause and statement of the charges, the scheduling of a hearing thereafter, his right to counsel and cross-examination at the hearing, and his right to file a verified answer prior to the hearing." *(Id.* at 15–16.) Defendants continue to explain Customs further followed statutory procedure in serving plaintiff with a "Notice of Revocation Proceedings" and "Notice to Show Cause and Statement of Charges" on July 5, 1994 and in notifying plaintiff by letter of the date, time and place of the revocation hearing and name of the administrative law judge who would preside.

Defendants disagree with plaintiff's assertion the preliminary proceedings are discretionary, and argue they are initiated pursuant to 19 U.S.C. § 1641(d)(2)(B) and the regulations promulgated in furtherance of the statute's provisions. Defendants assert

> [t]he regulatory provisions are far from non-mandatory or alternative dispute resolution procedures designed to avoid statutory proceedings as alleged by [plaintiff]. Rather, they were promulgated based upon the directives of § 1641, and incorporate the procedural requirements of § 1641. They outline all the procedures to be followed by the agency and ensure due process for all.
>
> These agency rules, moreover, distinguish between preliminary proceedings and formal proceedings. As applicable here, these agency rules provide that once the Commissioner of Customs determines that charges will be preferred against a broker (19 C.F.R. § 111.57(b)), the district director is to "advise the broker of his opportunity to participate in preliminary pro-

> ceedings with an opportunity to avoid formal proceedings against his license." 19 C.F.R. § 111.59(a). Thus, prior to the commencement of any proceedings, either preliminary or formal, the broker is "advised" through a "notice" of preliminary proceedings and a proposed statement of charges of an opportunity to participate in the proceedings. 19 C.F.R. § 111.59(b)(9) requires that the broker be afforded thirty days within which to respond. These provisions actually mirror the requirements of the statute, § 1641(d)(2)(B).

(Id. at 17–18.) Defendants conclude the regulations are not non-mandatory and fulfill the prescribed statutory procedure found in 19 U.S.C. § 1641(d)(2)(B) (1988). Defendants emphasize "[t]hat the agency regulations refer to the first stage of the revocation proceedings as 'preliminary' does not alter the fact that on March 9, 1993, the proceedings were instituted 'by the appropriate service of written notice' as required by 19 U.S.C. § 1641(d)(4)." *(Id.* at 19.)

Defendants additionally argue this Court decided this issue in *Fusco*, where the Court held a revocation proceeding was instituted when the "Proposed Notice to Show Cause And Notice of Preliminary Proceedings" was served upon the broker. Defendants disagree with plaintiff's argument *Fusco* is irrelevant to this case and argue "[q]uite the contrary, *Fusco* is instructive here as it directly addresses the crux of the issue before the court in this case." *(Id.* at 20.)[8] In comparing *Fusco* with this case, defendants argue "the crux of Mr. Fusco's argument was essentially the same as that of Mr. Urbano, *i.e.*, that the statutory proceedings were not 'instituted' until the formal notice was served." (Defs.' Mem. at 21.)

In *Fusco*, this Court held the revocation proceeding was "instituted" upon the commencement of the preliminary proceedings, noting the statute did not distinguish between preliminary and formal proceedings when it stated "*[a]ny proceeding* for revocation * * * of a license instituted under section 641 of the Tariff Act of 1930 before the date of the enactment of this Act shall continue and be governed by the law in effect *at the time the proceeding was instituted*." *Fusco*, 12 CIT at 838, 695 F. Supp. at 1192 (quoting the Tariff and Trade Act of 1984, Pub. L. 98–573, 98 Stat. 2948, 2989 (codified at 19 U.S.C. § 1304 note)) (emphasis added in *Fusco*).

Noting plaintiff's attempt to distinguish this case from *Fusco* by asserting "the term 'any proceedings' is not used in the statute of limita-

---

[8] Like the plaintiff in this case, Mr. Fusco was served with a "Notice of Preliminary Proceedings" and a "Proposed Notice to Show Cause and Statement of Charges," indicating Customs was considering instituting formal proceedings to revoke Mr. Fusco's customs broker's license and notifying him of the opportunity to show cause why his license should not be revoked. Customs instituted formal proceedings one year later with a "Notice to Show Cause and Statement of Charges," and, after a hearing, Mr. Fusco's license was revoked.

Plaintiff challenged the revocation of his license because the procedures in effect prior to the amendments made to 19 U.S.C. § 1641 by the Trade and Tariff Act of 1984 were utilized in the revocation. In order to determine which statute governed the revocation procedures, this Court was faced with the issue of when the revocation proceedings had been instituted. Mr. Fusco argued the statutory proceedings were not instituted until notice of the formal proceedings were served, while the Government argued revocation proceedings were instituted upon the commencement of the preliminary proceedings when the "Proposed Notice to Show Cause and Notice of Preliminary Proceedings" were served upon the broker. The Court held the revocation proceeding was instituted when the "Proposed Notice to Show Cause and Notice of Preliminary Proceedings" were received.

tions," defendants argue "[n]either § 1641(d)(2)(B) nor § 1641(d)(4) distinguishes between preliminary and formal proceedings for revocations." (Defs.' Mem. at 23.) Defendants continue to assert, rather,

> [t]he statutes merely provide for the commencement of proceedings by the service of notice. Section 1641(d) provides for disciplinary "proceedings" without more. Subsection (d)(4) provides for "limitations of actions" of revocation "proceedings," as well as suspension and unlicensed broker proceedings. As was the case in *Fusco*, the preliminary proceeding involved in this case is also a proceeding within the ambit of 19 U.S.C. § 1641(d)(2)(B). Thus, the revocation proceeding was "instituted" for purposes of the five-year statute of limitations on March 9, 1993, the date that the notice of preliminary proceeding was served.

(Id. at 23.)

Defendants note plaintiff's assertions that Customs, by merely initiating preliminary proceedings to toll the statute, can indefinitely extended the statute of limitations until it is ready to proceed with statutory proceedings. Defendants argue, however,

> [n]ot only does Customs not unilaterally and indefinitely extend the period in which formal proceedings are instituted but to do so would contravene the purpose of revoking a license in the first place because a broker who is found to be in violation of Customs regulations and appeal[s] [sic] that determination would still hold a license and be able to conduct * * * Customs business until the matter is resolved.

(Id. at 23 (citation omitted).) Defendants argue the cases cited by plaintiff on this issue are inapposite, because the issue in this case is not when a breach of a bond occurred or whether unnecessary administrative proceedings are pending, but whether the notice of March 9, 1993 represented the initiation of revocation "proceedings" within the meaning of 19 U.S.C. § 1641(d)(4) (1988). Defendants conclude "[i]n this case, the proceeding to revoke Mr. Urbano's license was commenced within the time allowed by statute; therefore, it was commenced in a timely manner and all of Mr. Urbano's arguments on this point should be disregarded." *(Id.* at 26.)

After considering the arguments of all parties, this Court holds the ALJ's determination that the March 9, 1993 written preliminary notice—which was served upon plaintiff within five years from the date the alleged violations were committed—represented the initiation of "proceedings" within the meaning of 19 U.S.C. § 1641(d)(4) (1988) and tolled the running of the statute of limitations, and the Secretary's subsequent adoption of that determination, is supported by substantial evidence on the record and is otherwise in accordance with law.[9] Customs correctly followed statutory procedure in serving plaintiff with a "No-

---

[9] Defendants also point out plaintiff was charged with numerous violations which occurred over two years. Plaintiff, defendants explain, "treats the statute as having run from only the first violation without discussing the fact that all of the other violations occurred thereafter. Mr. Urbano does not discuss the fact that Customs could have instituted separate proceedings for each and every one of the over 50 violations committed by him. Several of the violations did not arise until February 1989." (Defs.' Mem. at 26 n.10.)

tice of Preliminary Proceedings" and "Proposed Notice to Show Cause and Statement of Charges," in notifying plaintiff in writing of the grounds of the complaint and the charges against him, of plaintiff's right to respond to the charges within thirty days, and of the procedures which would follow, including delivery of a final notice to show cause and statement of the charges, the scheduling of a hearing thereafter, his right to counsel and cross examination at the hearing, and his right to file a verified answer prior to the hearing.

In addition, the Court disagrees with plaintiff's argument *Fusco* "has no relevance to the case at bar." (Pl.'s Mem. at 4.) In *Fusco*, this Court stated "[t]he issue in the instant action is whether the revocation proceedings against plaintiff are deemed 'instituted' from the date preliminary proceedings are commenced or from the date formal proceedings are initiated." *Fusco*, 12 CIT at 837, 695 F. Supp. at 1192. The Court is presented with the same issue in the instant case, and the parties make similar arguments. The Court previously was not persuaded by plaintiff's argument in *Fusco* that "the Notice to Show Cause initiates the procedures required to be followed in connection with the hearing, whereas the 'Notice of Preliminary Proceedings' accompanied by the 'Proposed Notice to Show Cause' triggers no such action." *Fusco*, 12 CIT at 838, 695 F. Supp. at 1193. Similarly, the Court is not persuaded by these arguments today. *Fusco* establishes the rule that revocation proceedings are instituted upon the commencement of preliminary proceedings and the Court follows this precedent in its decision today.

Customs followed its regulations in serving plaintiff with preliminary notices which alerted him to the possibility of revocation hearings, enabling him to respond. Ple Secretary's adoption of that decision is supported by substantial evidence on the record and is otherwise in accordance with law.

II. *Due Process Issues:*

Plaintiff alleges he was denied due process when the ALJ refused to permit him to depose certain Customs officials, deprived him access to the Customs' auditor's work papers, and failed to properly consider his illness during the first part of 1988 as mitigating evidence. Defendant, however, argues the administrative proceedings in this case were conducted in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501–559, 701–706, 3105, 3144 (1988), whose provisions govern discovery during license revocation proceedings. Defendant argues the ALJ did not deprive plaintiff of due process *"in any respect."* (Defs.' Mem. at 27 (emphasis added).)

1. *Time to Prepare for the Hearing:*

Title 5 U.S.C. § 556 governs the taking of evidence and the various powers of "employees presiding at [administrative] hearings." 5 U.S.C. § 556 (c) (1988). Administrative law judges are authorized to "take depositions or have depositions taken when the ends of justice would be served" and to "regulate the course of the hearing." 5 U.S.C. § 556(c)(4), (5) (1988). The regulation implementing the statute, 19 C.F.R.

§ 111.67(c), gives the hearing officer the discretion to permit or deny deposition testimony. The regulation provides "[u]pon the written request of either party, the hearing officer *may permit* deposition upon oral or written interrogatories to be taken before any officer duly authorized." 19 C.F.R. § 111.67(c) (1994) (emphasis added).

This Court finds plaintiff was not denied due process as a result of the conduct of the formal revocation hearing, and the ALJ's decision with respect to plaintiff's depositions requests is supported by substantial evidence on the record and is otherwise in accordance with law. Plaintiff accuses Customs of attempting to deprive him of adequate time to make preparations for the hearing, and claims "[t]he ALJ danced in step with the Customs Service and wrongfully refused plaintiff's request for postponement of the hearing." (Pl.'s Mem. at 18.) While plaintiff correctly argues before he can be deprived or a property right he must be afforded notice and the opportunity to be heard, this Court finds plaintiff was afforded both notice and a significant opportunity to be heard. In addressing the question of due process in Customs broker's license revocation hearings, this Court previously noted,

> [a]s annunciated in *Barnhart v. United States Treasury Department*, 7 CIT 295, 303, 588 F. Supp. 1432, 1438 (1984), "due process of law" requires notice and the opportunity to be heard. Additionally, the touchstone is one of fundamental fairness in light of the total circumstances. In the present case, plaintiff presented no proof that he was in any way prejudiced by denial of access to the administrative record prior to the hearing. He had sufficient notice and counsel competently presented plaintiff's case before the hearing officer. Plaintiff was also aware of the charges beforehand and the reasons Customs instituted proceedings against his customshouse broker's license. In light of these circumstances, the Court fails to find a denial of plaintiff's due process rights.

Fusco, 12 CIT at 840–841, 695 F. Supp. at 1195 (further citations omitted).

Similarly, the Court finds plaintiff in this case was aware of the charges beforehand and of the reasons Customs instituted license revocation proceedings. Like the plaintiff in *Fusco*, the plaintiff in this case had sufficient notice, competent counsel and was afforded notice of the charges against him and the opportunity to be heard. In this case, the initial notices of the charges against plaintiff on March 9, 1993, satisfied the statute's requirement that prior to the institution of a revocation proceeding, the respondent receive "notice by the agency in writing of the facts or conduct which may warrant the [revocation]" and the "opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c)(1), (2) (1988). Additionally, the July 5, 1994 "Notice of Revocation Proceeding" with the "Notice to Show Cause and Statement of Charges" again informed plaintiff of each and every charge against him and of his opportunity to file a verified answer. Moreover, plaintiff was notified of his hearing date six weeks prior to the hearing. Plaintiff's opportunity to be heard, to present evidence and to conduct cross-examination was afforded at the hearing on August

30–31, 1994, fulfilling 19 C.F.R. § 111.67(b)'s requirements that at a hearing the broker has "the right to examine all exhibits offered at the hearing," the "right to cross-examine witnesses" and the right to "present witnesses who shall be subject to cross-examination by the Government representatives." 19 C.F.R. § 111.67(b) (1994). This Court expressly finds that the ALJ acted reasonably when he declined to order discovery of witnesses on the eve of the hearing, especially in light of all the time that was available to the plaintiff prior to the hearing. As a result, this Court finds plaintiff was not denied due process of law.

Although this Court notes plaintiff's claim "[s]erious preparations commence [only] when the parties know that the matter is going to hearing," (Pl.'s Mem. at 18), plaintiff at a minimum could have commenced initial preparations after receiving the preliminary notices, especially taking into account Customs' notification to him that it was considering bringing a formal hearing. This Court does not agree with plaintiff's argument the government purposely spent sixteen months between the preliminary and final notices preparing for the formal hearing "all to [plaintiff's] detriment" and then only notified plaintiff "[w]hen all its preparations were substantially completed." (Pl.'s Reply Br. at 4, 9.)

Furthermore, the Court finds no evidence to indicate the ALJ in this case was biased in any way, nor to demonstrate the ALJ and Customs impaired plaintiff's rights in any way. This Court finds no evidence to indicate Customs "controlled the time when it would issue the formal proceedings so it could proceed and complete its preparations for the hearing before it served plaintiff with the formal revocation proceedings." (Pl.'s Mem. at 18.) This Court holds the ALJ did not abuse his discretion but correctly acted within his authority in refusing to grant an extension and postpone the hearing[10] and in limiting the amount of discovery to which plaintiff was entitled.

2. *Testimony and & Alleged Bias of the Customs Auditor:*

Plaintiff argues the testimony of the Customs auditor "must be disregarded because it consisted of unreliable hearsay evidence; was one-sided in the government's interest; and biased." (Pl.'s Mem. at 12.) Plaintiff's principal complaint with regard to the Customs auditor's testimony was his alleged failure to inquire about plaintiff's accounts receivables. Plaintiff asserts

> [i]t is incredible that [the Customs auditor] ignored plaintiff's accounts receivable and relied solely on documents submitted to him by the complaining importers about paying the Customs duties twice. Apparently, none of the complaining importers told [the Customs auditor] that plaintiff also advanced funds for them. Any unbiased and competent auditor would have inquired about the accounts receivable to get an objective and accurate overview of plaintiff's operations. If the alleged double payments of Customs

[10] This Court also notes defendants' argument "[plaintiff] had known of the charges for over a year, had been notified of a hearing date six weeks previously, and had already been granted one extension of time during which no discovery was sought. [Plaintiff] can hardly complain about lack of access, when he failed to request discovery until the hearing was imminent." (Defs.' Mem. at 31 (footnote omitted).)

> duties by importers were the events which led to the license revocation proceedings, why were they not conducted in a more competent fashion by the Customs Service? We believe the answer to that question is that the Customs Service was out to get [plaintiff] and only that evidence which pointed to culpability was analyzed and considered.

(Id. at 13–14.)

Plaintiff additionally argues "[a]dditional insight into [the Customs auditor's] persona and bias in this case was exposed at the hearing. [The Customs auditor's] bias for the government * * * explains his refusal to appear at a depositions before the hearing." *(Id.* at 14–15 (citation omitted).) Plaintiff argues the Customs auditor "did not appear at the deposition because the government had done so much for him and plaintiff had done nothing for him. Yet nothing was done by his supervisors to insure that his report was fair and objective." *(Id.* at 15.)

Defendants argue "[t]he testimony of * * * the Customs auditor was not tainted and the ALJ gave that testimony the weight it was due in light of all the testimony and evidence presented at the revocation hearing." (Defs.' Mem. at 34.) Defendants additionally argue the Customs auditor was not biased "and the evidence presented at the hearing demonstrated that a fair and objective audit of [plaintiff's] Customs broker's license was conducted." *(Id.* at 35.) Defendants note the facts which support the Secretary's decision to revoke plaintiff's license were found after a two-day hearing, during which numerous exhibits were presented and testimony from thirteen witnesses was given. Defendants conclude "[n]either the ALJ's recommendation nor the Secretary's decision to revoke [plaintiff's] broker's license rested solely on the conclusions of the auditor's report or the testimony of the auditor himself." *(Id.* at 36.)

This Court finds nothing in the record to indicate the Customs auditor was biased or that his report was unfair or unobjective. While the Court notes plaintiff's argument the Customs auditor's refusal to be voluntarily deposed by plaintiff suggests he was biased, this Court believes the ALJ was entitled to give the Customs auditor's testimony the weight the ALJ thought appropriate given the circumstances. This Court declines to substitute its judgment for the ALJ, who was present at and conducted the revocation hearing. Additionally, as this Court noted in response to a similar allegation of bias in *Anderson v. United States*, 16 CIT 324, 328, 799 F. Supp. 1198, 1203 (1992), "plaintiff had the opportunity to make a showing of bias or prejudice on cross-examination; no evidence of bias or prejudice emerged."

3. *Access to the Customs Auditor's Notes and Work Papers:*

Plaintiff argues although "it was discovered during the cross examination of [the Customs auditor] that he had voluminous notes and back-up documents supporting his audit," plaintiff's request they be made immediately available was unfairly denied. (Pl.'s Reply Br. at 9.) Plaintiff maintains access to these papers was especially crucial because "plaintiff was effectively denied the opportunity to depose [the Customs auditor], and these documents contained exculpatory evidence, else

why would the government claim that they belonged [to] [sic] the government and refuse access?" (Pl.'s Mem. at 15–16 (citation omitted).)[11] Plaintiff argues the ALJ's refusal to provide plaintiff access to the papers "is a grave violation of due process," committed solely because the government did not want to "disclose exculpatory evidence on [plaintiff's] case." *(Id.* at 16.)

Plaintiff further argues "the Customs Service entrusted an important audit to an inexperienced, biased auditor who knew very little about Customs broker operations." *(Id.* at 16.) Plaintiff's examples of the auditor's experience include: (1) the Customs auditor's failure to contact plaintiff to obtain information from him during the ten months of his audit, (2) the auditor's indication that Royal International and not plaintiff was under investigation "even though both were one and the same," (3) this was the first audit he performed alone, (4) he reached conclusions in his audit reports on subjects he never inquired about, and (5) "[The Customs auditor] did not know the definition of 'Customs business' which was one of the charges, yet he recommended that same charge against plaintiff.". *(Id.* at 16–17.) Plaintiff criticizes the ALJ for accepting the auditor's conclusions and argues the audit report drafted by the Customs auditor was "a dangerous weapon." *(Id.* at 17.) Plaintiff concludes "[r]evocation proceedings should be supported by sterner 'stuff.'" *(Id.)*

Defendants argue plaintiff was not denied due process when he was refused access to the Customs auditor's notes and work papers during the revocation hearing because plaintiff "did not have an unfettered right to these documents." (Defs.' Mem. at 31.) Defendants instead argue plaintiff "was accorded all the process which he was due." *(Id.* at 28.) Defendants explain plaintiff received the documents which formed the basis for the Customs auditor's report and the agency's decision to revoke his license, but did not request copies or access to the auditor's notes and working papers prior to the hearing. *(Id.* at 31; *see also* Admin. R. at 329.)

After considering the arguments from both parties on this issue, this Court disagrees with plaintiff's claim "[t]he ALJ * * * abused his discretion when it was discovered on cross-examination of [the Customs auditor] that he had a large amount of working documents which backed up his audit report at government counsel's office just down the hall from the hearing room, and he refused plaintiff's counsel access to them." (Pl.'s Mem. at 19.) During the revocation hearing, the ALJ noted plaintiff's request and responded

> the evidence, although it would be relevant, it would be just as likely to confuse the record and to expand its length without us getting much benefit out of it at all.

---

[11] Defendants respond to plaintiff's "unsupported allegation" the notes and work papers contained "exculpatory evidence" by arguing

> [a]s [plaintiff] did not have an inalienable right to these documents and never had possession of them, he cannot legitimately speculate on their content. Moreover, as will be discussed more fully herein, the decision to revoke [plaintiff]'s broker's license was not based solely on the audit report. Instead, the decision to revoke his license was based upon the evidence presented at the revocation hearing. Nowhere in his brief does [plaintiff] challenge the credible evidence upon which the decision to recommend revocation by the ALJ, or the Secretary's decision to actually revoke the license, was based.

(Defs.' Mem. at 28 n.12.)

> I think there is an element, too, of not having aggressively moved on this at an earlier time.
>
> And relevance notwithstanding, there is the open question of privilege. There would have to be an argument. At least, at a minimum, there would have to be motions on this anyway. I don't see the trade-off as benefitting the justice that we are trying to accomplish here * * *.

Admin. R. at 332–33.[12] Instead, the ALJ allowed plaintiff wide latitude on cross-examination to question the Customs auditor about the papers. This Court notes, if as plaintiff argues, the documents contained exculpatory evidence, plaintiff had the opportunity to question the Customs auditor about the content of the documents. The Court further notes plaintiff did not request access or copies of the auditor's notes prior to the hearing. For seemingly inexplicable reasons, plaintiff, notwithstanding notice and the length of time that expired until the hearing, apparently did not seek discovery until the eve of the hearing or indeed in the hearing itself. This Court will not disturb the decision of the ALJ reasonably exercised to avoid further delay. Accordingly, the Court finds the ALJ's decision that the probative value of introducing the working papers and notes of the auditor was outweighed by the undue delay and waste of time that might result from their introduction is within the ALJ's discretion and is supported by substantial evidence on the record and is otherwise in accordance with law.

4. *Plaintiff's Illness as a Mitigating Factor:*

Although plaintiff does not discuss the issue of his illness in great detail in his brief, in his complaint plaintiff argued he was deprived of due process because the ALJ "did not take into account the illness of plaintiff during the first six months of 1988 which incapacitated plaintiff and curtailed the time he was able to spend at his business." Compl. § 41. Defendants respond by arguing "[t]his allegation is simply not accurate. Paragraphs 41 and 42 of the Decision and Order of the ALJ specifically refer to [plaintiff]'s illness as a potentially mitigating factor." (Defs.' Mem. at 34.)

In paragraph 41 of the ALJ's Decision and Order in a section entitled "Mitigation", the ALJ discusses the evidence of plaintiff's illness and plaintiff's argument for mitigating circumstances offered in support of a sanction less severe than license revocation. In paragraph 42, the ALJ concludes while there is no apparent reason to disbelive plaintiff was ill,

> by [February 1988] the business of Royal International had been terminated and business records had been turned over to the Customs Service. [Plaintiff's] illness does not excuse his failure to adequately supervise the business of Royal International * * *. In addition, by making at least periodic visits to the office [plaintiff] could have minimally assured that the necessary tasks were being performed by the Royal International office staff. [Plaintiff] testi-

---

[12] In making this ruling, the ALJ cited Federal Rule of Evidence 403, which states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

> fied that even in his weakened condition he was able to visit the office three days per week. Yet [plaintiff] just did nothing.

United States Customs Service v. Urbano, No. LA–92–0042 RMG, Slip Op. at 16–17 (Feb. 3, 1995) (decision and order). This Court finds plaintiff offered no evidence to demonstrate why the ALJ's decision with respect to this issue should be reversed and holds it to be supported by substantial evidence on the record and otherwise in accordance with law.

CONCLUSION

For the reasons discussed above, this Court denies plaintiff's Motion for Judgment on the Agency Record. This Court finds the ALJ's recommendation that plaintiff's license should be revoked and the Secretary's subsequent adoption of that recommendation is supported by substantial evidence on the record and is otherwise in accordance with law. This Court also denies plaintiff's Motion for Oral Argument on its Motion for Judgment on the Agency Record, finding the parties' papers clear and extensive. This action is dismissed.

(Slip Op. 97–69)

NISSHO IWAI AMERICAN CORP., NIKE, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 90–11–00584

[Plaintiffs' motion for summary judgment denied. Defendant's motion for summary judgment granted.]

This matter is dismissed with prejudice.

(Decided May 30, 1997)

Stein Shostak Shostak & O'Hara (James F. O'Hara) and Law Offices of Michael P. Maxwell (Michael P. Maxwell) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein, Barbara Silver Williams)*; United States Customs Service *(Chi Choy*, Office of Assistant Chief Counsel, International Trade Litigation), for defendant.

DECISION AND JUDGMENT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

WATSON, *Senior Judge:* This test case involves a tariff term in which footwear is described as having a "foxing-like band." As a result of the Government's decision that the fifteen models of athletic footwear at issue had "foxing-like bands," the importer could not enter them under subheadings 6402.91.40 and 6402.00.15 of the Harmonized Tariff Schedule of the United States (HTSUS). Under those subheadings the footwear would have been dutiable at 6%.

Instead, as a consequence of being found to have "foxing-like bands," the footwear, depending on the model, was classified under subheadings 6402.91.80, 6402.91.90 and 6402.99.90 of the HTSUS and assessed with duty at 20% or 90 cents a pair plus 20%.

The legal issue in this case is whether these importations are described by the specific exception to subheadings 6402.91.40 and 6402.99.15 as "footwear having a foxing or foxing-like band applied or molded at the sole and overlapping the upper." There are no genuine issues of fact, only a few factual skirmishes of the type that always accompany a hotly contested case.[1]

A short description of the structure of the importations together with an illustrative photograph of a sample [Fig.1], will make it easier to understand where the parties differ. On the bottom of the footwear at issue is a sole of rubber, a bottom piece that occupies the traditional place of the sole of the shoe. That bottom piece has a wavy edge that occasionally goes up noticeably higher than the flat interior. Those high spots extend above the line where the upper part of the shoe joins the lower part.

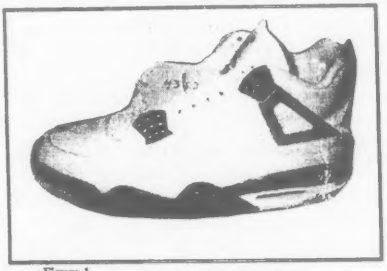

Figure 1
Photograph of a sample of the footwear at issue, Nike "Air Jordan," Model No. 4342, submitted as Defendant's Exhibit DX5(a).

Above the bottom piece is another piece that fits on to the bottom. The second piece is a mid-sole made of polyurethane or ethylene vinyl acetate (EVA). Nike calls it a "foot frame." It resembles the bottom piece and also has a wavy perimeter with portions that rise above the junction with the upper part of the shoe when they are put together. The bottom sole and the mid-sole are cemented together. Then the plastic upper portion of the shoe is joined to the lower. As a result, the two portions of the sole just described overlap the upper at various points around the perimeter of the shoe, creating a wavy effect. At some points the overlap rises up from the bottom sole; at others, it comes from the mid-sole.

The plaintiffs' main argument is that, while the overlap coming from the bottom sole can be foxing or foxing-like, the overlap from the mid-sole cannot. Plaintiffs argue that the overlap from the mid-sole is not within the meaning of foxing, or foxing-like band, and further argue that to treat it as such goes beyond the intention of the parenthetical ex-

[1] Fox example, there are inconsequential disputes about whether certain Customs officers said to representatives of Nike that the importations did not have "foxing-like bands." These are inconsequential because the Customs service is not bound by the oral opinions or advice of its personnel. 19 CFR § 177.1(b). There is also a dispute about the extent to which the sole overlaps the upper on Style No. 5520.

ception written by Congress, contradicts legislative history and is counter to the Customs Service's prior interpretation of the term.

Plaintiffs argue extensively that the primary purpose of the mid-sole "foot frame" is to provide motion control and stability for athletic use of the footwear. They contrast this purpose and design with that of "foxing." Plaintiffs point out that "foxing" was originally a separate band that went around a shoe and was designed to secure the upper to the sole and, at the same time, to conceal the line of juncture between the upper and the sole band. Plaintiffs argue that its foot frame mid-sole is not like foxing in any significant respect in that it does not bond the upper to the sole and does not conceal a juncture line between upper and lower parts of the shoe. On the question of whether the visual attributes of the importations resemble foxing, the plaintiffs insist that consumers make a meaningful distinction between the importations and shoes that have the appearance of original foxing.[2]

It is the view of the court that the dissimilarity of the entire mid-sole to "foxing" can be accepted. But that is not the crux of the matter. It is the effect of the externally visible portions that must be evaluated. If the problem before the Court was simply classifying the mid-sole, and we were faced with competing provisions for "foxing" and for, let us say, "structural elements" of footwear, the application of the foxing language would be weak. In that situation, the major functional role of the mid-sole would have controlling importance. But here it is only the effects of the external resemblance to foxing that is important. In this situation, the real question is if the scalloped perimeter of the mid-sole is somehow precluded from being considered as like foxing in its relation to the exterior of the shoe.

Since the statutory language does not give us a clear understanding of what is meant by "foxing-like band" it becomes necessary to examine the legislative history. That history makes it clear that the term "foxing-like band" arose from a general and continuing intention to provide an increased level of tariff protection to the domestic rubber footwear industry. Under the Tariff Act of 1930, most footwear was classifiable under ¶1530(e), a provision which made footwear whose uppers were in chief value of non-leather material dutiable at a higher rate than those whose uppers were in chief value of leather. The provisions of ¶1530(e) for footwear with uppers made of material other than rubber was later subdivided into six categories depending on the sole material, one of which was for footwear "with soles wholly or in chief value of India rubber or substitutes for rubber." Apparently, importation of rubber-soled shoes continued to threaten the existence of the American rubber footwear industry to the point where a Presidential proclamation was issued in 1933, designed to further increase the amount of duty owed by importations. Imported rubber-soled shoes with fabric uppers continue to be assessed with a 35% duty under ¶1530(e) but the assessment was based on the American Selling Price for a comparable domestic shoe, a

[2] This argument is rejected on the ground that the issue before the court is not one that can be determined or decided by reference to the perceptions of consumers.

value which would presumably have been higher than that of the imported shoe. This American Selling Price, or "ASP" valuation was intended as a tariff protection against rubber footwear designed for protection against rain, and rubber-soled footwear which was used for sports. In subsequent years there ensued a series of measures and counter-measures by the importers and the Government. At first importers were able to design around the onerous ASP valuation by doing such things as inserting a leather "filler" between the insole and the outer sole. Footwear that otherwise would have been valued on the basis of ASP escaped that higher valuation because the leather filler rendered the sole in chief value of leather rather than rubber. In response, Congress amended ¶1530(e) in 1954 to provide that footwear would be considered as having a sole in chief value of rubber if a major portion of the outer sole alone was composed of rubber or substitutes of rubber. Thereafter importers found a way to design around the new provision by adding the leather to the tongue or other parts of the shoe upper, making the shoes as a whole in chief value of leather and thereby removing them from the ASP valuation. In 1958 Congress responded to that development by again amending ¶1530(e) to add a "material of chief surface area" test to the existing "material of chief value" test. In other words, inasmuch as the insertion of a small amount of high-value leather did not affect the chief surface area of the shoe, it would no longer be successful in getting the shoe classified as one with a leather upper or as in chief value of leather.

As summarized in the Tariff Classification Study of 1960:

> The Congress has twice enacted legislation "to close the loophole in the Tariff laws by which foreign producers are, by artful manipulation of a product, avoiding an import duty imposed specifically for the protection of the domestic rubber-soled footwear industry."

In the Customs Simplification Act of 1954, P.L. 83–768 (1954), Congress authorized the Tariff Commission to study, modernize and redraft the Tariff Schedules then in effect under the Tariff Act of 1930. The resulting Tariff Schedules of the United States took a new approach to the classification of footwear. Congress created three HTSUS provisions for rubber and plastic footwear—Items 700.50, 700.55, and 700.60 of the HTSUS. Congress also employed the phrase "foxing or foxing-like bands" to describe that category of footwear that should not escape the ambit of ASP. Item 700.60 of the HTSUS was intended to include the broad classification of imported rubber-soled footwear which was subject to "ASP," including rubber-soled athletic type footwear with fabric or plastic coated uppers. The Tariff Classification Study specifically stated that the parenthetical exception for footwear having foxing or a foxing-like band was "designed to ensure classification in Item 700.60 of a style of imported shoe with plastic coated uppers but having the general outward appearance of the traditional "sneaker or tennis shoe." *TCS, DX* 16 at 24. It is clear that the third category of footwear intended to be governed by the "foxing-like band" exception included rubber-soled athletic footwear.

Given the clear intention discernible from the legislative history, the question becomes whether there is any thing about the importations at issue that distinguishes them in a meaningful way from the athletic footwear that was the subject of legislative concern. The plaintiffs have not persuaded the Court that these importations are different in a tariff sense from the so called "traditional" athletic footwear or "sneakers" of the past. There is no question that the appearance or style or "image" of this variety of new athletic footwear has changed, however, its basic function and its basic position in the larger spectrum of footwear has not changed. The Court is not persuaded that the presence of a "foot frame mid-sole" in this new style of athletic footwear is a development of such a transforming nature that it changes the basic function and identity of the importations. It may well be a significant technical achievement in the search for better athletic footwear. However, it would be unreasonable to treat this mid-sole component as something so radical that it breaks the association of these importations with those products that have long been the subject of special Congressional concern.

None of what has been said here is intended to characterize the "foot-frame mid-sole" as part of an attempt to design a product that would avoid a certain classification or rate of duty – although, in any event, that would not affect the merits of the case. The history of the shoe provision has been recounted in order to show what persuaded the court that there was an inclusive intent to the provision for "foxing or foxing-like bands." That intentional inclusiveness reinforces the general rule that the terms used in tariff law extend even to advanced varieties of products that may not have been in production at the time the statutory phrase was written. *Standard Surplus Sales v. United States*, 667 F2d 1011, 69 CCPA 34, 38 (1981); *Lanston Industries, Inc. v. United States*, 49 CCPA 123, 127, C.A.D. 807 (1962)

Plaintiffs also seek to rely on guidelines issued by Customs in 1983 for the general guidance of Customs Officers in classifying footwear with "foxing" or "foxing-like bands." *T.D. 83–116*. T.D. 83–116 included seven guidelines for analysis of whether footwear contained a foxing-like band. It would be pointless to get into the question of whether those guidelines define the terms at issue in a way that should redound to the benefit of plaintiffs' claim in the present case for the simple reason that such guidelines cannot be inconsistent with, and cannot countermand, legislative intent. *See, e.g., Central Soya, Inc. v. United States*, 15 CIT 105, 761 F. Supp. 133 (1991), *aff'd*, 953 F.2d 630 (Fed. Cir. 1992). In any event, if it came to analysis of those guidelines the court would, in all likelihood, read them as not ruling out the application of the foxing terminology to the present importations.

In the same vein, it is immaterial whether or not the plaintiffs received an informal opinion from an import specialist in Portland, Oregon that advance samples of these importations did not have "foxing-like bands". Such opinions do not bind the Customs Service. The way to obtain a binding ruling on a prospective transaction is to ask for a binding ruling to be issued pursuant to 19 C.F.R. § 177.1. Failing

that, none of plaintiffs' attempts to rely on meetings or conversations with Customs personnel have any bearing on the legal question before the court.

Finally, there is nothing in the case law to support a limited view of the scope of the term "foxing-like band" or to alter the court's perception of the legislative intent. In *Far Eastern Dep't Store U.S.A.—Inc. v. United States*, 11 CIT 932, 678 F. Supp. 892 (1987), *aff'd per curiam*, 852 F2nd 1286 (Fed. Cir. 1988), the application of "foxing" language to athletic footwear was taken for granted. In that case the court decided that neither the "invisibility" of the foxing in question nor the fact that it was applied to footwear that did not have the appearance of a "sneaker" or "tennis shoe" could avoid its effect on the classification of a slip-on shoe with a cotton upper and a rubber sole.

In *Pagoda Trading Co. v. United States*, 6 CIT 296, 577 F. Supp. 22 (1983), although the aforementioned T.D. 83–116 was involved, this court said nothing to suggest what it meant with respect to foxing or to imply in any way that it was the final word on the subject of foxing or foxing-like bands. That decision merely held that the court could not presume that the guidelines would be applied to future importations and that it was premature for an importer to bring an action regarding indeterminate future importations based on that assumption. That issue was purely jurisdictional and provides no guidance for the issue herein.

For the reasons given above the court concludes that the government was correct to treat these importations as having a "foxing-like band". None of the arguments advanced by plaintiffs have overcome the demonstration that it was the legislative intention that the term "foxing-like band" would describe the material that encircles these importations.

Judgment will enter accordingly.

(Slip Op. 97–70)

USINOR SACILOR, UNIMÉTAL, AND ASCOMÉTAL, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND INLAND STEEL BAR CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–04–00230

[Remanding the United States Department of Commerce's, International Trade Administration, final countervailing duty determination.]

(Dated May 30, 1997)

Weil, Gotshal & Manges (*M. Jean Anderson* and *Gregory Husisian*) for Usinor Sacilor, Unimétal, and Ascométal, plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Reginald T.*

Blades, Jr.); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Terrence J. McCartin*), of counsel, for defendant.

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr.*, *Alan H. Price*, and *Peter S. Jordan*) for Inland Steel Bar Company, defendant-intervenor.

Memorandum and Opinion

Goldberg, Judge: This matter is before the Court after the United States Department of Commerce, International Trade Administration, ("Commerce") issued its final results of redetermination on March 25, 1997 *("Second Redetermination")*. The *Second Redetermination* is the third time that Commerce has issued final results in this matter, and today's decision is the third time that the Court has remanded Commerce's results. Commerce issued the *Second Redetermination* pursuant to this Court's most recent remand decision, *Usinor Sacilor v. United States*, ___ CIT ___, 955 F. Supp. 1481 (1997) *("Usinor Sacilor II")*. In *Usinor Sacilor II*, the Court remanded the case to Commerce, directing it to determine the amount of the monetary transfers made by Usinor Sacilor to its non-French subsidiaries, and to incorporate this amount into its countervailing duty calculation. ___ CIT at ___, 955 F. Supp. at 1488.

Today, the Court remands Commerce's *Second Redetermination* because Commerce refused to adjust the countervailing duty to reflect these transfers. Instead, Commerce erroneously concluded that evidence of the French government's intent, when it provided subsidies, and its control over Usinor Sacilor outweighs the evidence of the transfers. The Court holds that Commerce's weighing analysis is not supported by substantial evidence. Because Commerce failed to adjust the countervailing duty to reflect the transfers, the Court remands the case to Commerce to adjust the countervailing duty. As part of today's remand, the Court also clarifies prior remand instructions to aid Commerce when it reevaluates the evidence.

Additional background facts underlying this case can be found in this Court's first remand decision, *Usinor Sacilor v. United States*, 19 CIT ___, 893 F. Supp. 1112 (1995) ("*Usinor Sacilor I*"). The Court exercises jurisdiction under 28 U.S.C. § 1581(c) (1988).

Standard of Review

When reviewing an agency's factual findings, the Court must uphold the agency if its findings are supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the Court affirms agency factual determinations that are reasonable and supported by the record when considered as a whole, even though there may be evidence that detracts from the agency's conclusions. *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 138, 744 F.2d 1556, 1563 (1984).

DISCUSSION

In its *Second Redetermination*, Commerce reviewed evidence establishing that the parent company, Usinor Sacilor, transferred funds to its non-French production operations during a period when it received countervailable subsidies from the French government. *Second Redetermination* at 9–12.

Although Commerce recognized that Usinor Sacilor made large transfers of funds to non-French production operations, Commerce refused to adjust the countervailing duty to reflect these transfers. Instead, it assigned "marginal weight" to the transfers. *Id.* at 13. Commerce then concluded that evidence of the transfers was outweighed by other non-economic evidence suggesting that the French government's subsidies benefitted only French production operations. *Id.* at 13–14. This non-economic evidence consists of the French government's intent in granting subsidies and its control over Usinor Sacilor.[1] Commerce concluded that the intent and control evidence is a better indicator of the likely effects of subsidies than evidence of transfers. *Second Redetermination* at 14. Commerce also argued that there is insufficient evidence to show that Usinor Sacilor actually used subsidies to fund non-French operations. *Id.*

The Court rejects Commerce's weighing analysis as a way to evade this Court's instructions in *Usinor Sacilor II* to adjust the countervailing duty to reflect all relevant evidence in the administrative record.

Assuming, for purposes of the instant review, that the evidence in the administrative record uniformly supports Commerce's conclusion with regard to the French government's intent and control, the Court nevertheless holds that the countervailing duty must be adjusted to reflect the transfers. The Court also rejects Commerce's conclusion that there is no evidence showing that Usinor Sacilor would likely use subsidies to fund non-French operations. *Second Redetermination* at 14.

Usinor Sacilor's transfers to non-French production operations are persuasive evidence in the administrative record regarding the firm's likely uses of subsidies. *Id.* at 9–12 (describing evidence of transfers contained in the administrative record). These transfers total hundreds of millions of dollars. *Id.* They constitute a definable percentage of the subsidies received by Usinor Sacilor from the French government. *Id.* Significantly, they represent the only hard financial evidence presented to this Court as to how subsidies may have been used. The Court finds that the transfers demonstrate that a portion of the subsidies were likely used to benefit Usinor Sacilor's non-French production.

When Commerce refused to adjust the countervailing duty to reflect these transfers, it calculated the countervailing duty as if no such transfers were made. Commerce erred in this decision.

---

[1] The intent and control evidence to which Commerce refers in the *Second Redetermination* presumably consists of statements by French government officials in public and in cabinet meetings, protocols between the French government and Usinor Sacilor, and a study analyzing the restructuring of the French steel industry. *See Usinor Sacilor I*, 19 CIT at ___, 893 F. Supp. at 1140 (describing the intent evidence Commerce has presented to this Court).

Although Commerce showed that Usinor Sacilor's annual transfers to its non-French production subsidiaries amounted to a small percentage of the total amount of subsidies received by Usinor Sacilor each year, *id.* at 15–18, it did not find that these transfers are *de minimis*. Thus, even if these transfers only marginally affect the countervailing duty, as Commerce contends, they nevertheless have some effect. The present countervailing duty, therefore, fails to reflect all significant evidence contained in the administrative record. To this extent, the countervailing duty is inaccurate and unsupported by substantial evidence.

For the foregoing reasons, the Court remands this matter to Commerce to amend the countervailing duty to reflect the evidence of the transfers from the parent company to non-French production operations.

The Court also takes this opportunity to clarify two aspects of its earlier remand in *Usinor Sacilor II*. First, in its *Second Redetermination*, Commerce incorrectly interpreted this Court's instructions in *Usinor Sacilor II* to mean that it must only consider evidence contained in the plaintiffs' supplementary briefs. *See Second Redetermination* at 9. The Court did not limit the scope of evidence to be considered by Commerce on remand. Rather, the Court instructed Commerce to consider all relevant economic evidence pertaining to the likely uses of subsidies. *Usinor Sacilor II*, ____ CIT at ____, 955 F. Supp. at 1488. Therefore, Commerce should consider all relevant evidence in the administrative record when conducting its redetermination regarding adjustments to the countervailing duty.

Second, in *Usinor Sacilor II*, the Court did not direct Commerce to "trace" the subsidies to their actual end-use in the non-French subsidiaries. Rather, the Court instructed Commerce to examine the transfers that Usinor Sacilor made to its non-French subsidiaries. The Court determined that this evidence is germane because it indicates the extent to which subsidies were likely used for non-French production operations. *Usinor Sacilor II*, ____ CIT at ____, 955 F. Supp. at 1489. Because no further tracking of the funds has been ordered by this Court, the remand instruction to examine transfers from the parent to the subsidiary does not constitute a requirement that Commerce "trace" subsidies to their actual end-use in the subsidiary. *Id.*

CONCLUSION

Upon consideration of all of the parties' arguments and submissions, the Court remands Commerce's *Second Redetermination* with instructions to analyze all direct economic evidence on the likely effects of subsidies and to adjust the countervailing duty in light of this evidence. The Court's order will be entered accordingly.

SCHEDULE OF CONSOLIDATED CASES

1. *Inland Steel Bar Company v. United States*, Court No. 93–04–00232.

2. *Usinor Sacilor, Unimétal, and Ascométal v. United States*, Court No. 93–04–00230.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/56 5/23/97 Pogue, J.	Verosol USA, Inc.	92–10–00698, 93–06–00300, 93–12–00774, and 94–04–00324	5407.60.20 17%	5907.00.90 5.8%	Agreed statement of facts	Pittsburgh, PA Metalized fabric
C97/57 5/27/97 Goldberg, J.	Omya, Inc.	95–03–00319	6909.19.50 8.0%	6909.11.20 4.7%	Agreed statement of facts	St. Albans, VT Porcelain grinding beads
C97/58 5/30/97 Goldberg, J.	Brown and Sharp Mfg. Co.	95–08–01036, and 96–01–00035	CMMs, finished or unfinished: 9031.40.00 10% 1993 9031.40.40 10% 1994 9031.40.40 8.7% 1995 CMM parts and accessories 9031.90.40 10% 1993 9031.90.55 10% 1994 8.7% 1995 9031.90.45 8.7% 1995	9031.80.00 4.9% (1993–94) or 4.3% (1995) Parts and accessories 9031.90.60 4.9% (1993–94) or 4.3% (1995)	Agreed statement of facts	Boston, MA, Detroit MI Touch probe Coordinate Measuring Machines (CMMs) and parts and accessories

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V97/8 5/19/97 Musgrave, J.	A.N. Deringer, Inc.	96–03–00867	Transaction value, as defined in 19 U.S.C. § 1401a(b)	Deductive value, as defined in 19 U.S.C. § 1401a(d) refund $3,898.39 plus interest	Orbisphere Corp. *v.* United States 13 CIT 866, 726 F. Supp. 1344 (1989)	Boston Oxygen analyzing apparatus
V97/9 5/27/97 Goldberg, J.	Tomato, Inc.	88–07–00579	Invoiced prices, which included non-dutiable quota charges, plus in some cases, buying agents' commissions/ inspection fees	Invoiced prices less any non-dutiable quota charges included in the invoice prices, and without the addition of any non-dutiable buying agents commissions/ inspection fees	Agreed statement of facts	Los Angeles Men's and boy's shirts or sweatshirts

Index

Customs Bulletin and Decisions
Vol. 31, No. 24/25, June 18, 1997

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS

Proposed Rulemaking

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 1997–417–405–40038